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# REPORTS

OF

# CASES AT LAW

ARGUED AND DETERMINED IN

# THE SUPREME COURT

OF

# NORTH CAROLINA.

---

**From August Term, 1849, to December Term, 1849, Both Inclusive.**

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## BY JAMES IREDELL.

VOLUME X.

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# JUDGES

OF THE

## SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

Hon. THOMAS RUFFIN, Chief Justice.
Hon. FREDERIC NASH.
Hon. RICHMOND M. PEARSON.

---

## JUDGES OF THE SUPERIOR COURTS,

Hon. THOMAS SETTLE.
Hon. JOHN M. DICK.
Hon. JOHN L. BAILEY.
Hon. MATTHIAS E. MANLY.
Hon. DAVID F. CALDWELL.
Hon. WILLIAM H. BATTLE.
Hon. JOHN W. ELLIS.

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## ATTORNEY GENERAL,

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EDMUND B. FREEMAN, Esquire.

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## CLERK AT MORGANTON,

JAMES R. DODGE, Esquire.

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## REPORTER,

JAMES IREDELL.

---

## MARSHAL,

J. T. C. WIATT.

108004

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# CASES AT LAW

ARGUED AND DETERMINED IN

# THE SUPREME COURT

OF

# NORTH CAROLINA,

AT

MORGANTON,

AUGUST TERM, 1848.

---

MASTIN and GRAY v. ANDREW PORTER.

An appeal from an interlocutory order of the county court will be sustained, when the question presented to the court is such, that a judgment upon it one way would put an end to the cause.

The cases of *Hunt* v. *Crowell*, 2 Murph. 434, and *Harvey* v. *Smith*, 1 Dev. & Bat., 186, cited and approved.

Appeal from the Superior Court of Law of WILKES County, at the Spring Term 1846, his Honor, Judge *Caldwell*, presiding.

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NOTE.—Owing to the indisposition of the Reporter, the first eight cases were omitted to be reported at the proper time.

MASTIN *v.* PORTER.

This was an action of debt upon a former judgment commenced by a warrant, issued by, and returnable before, a single justice out of court. The warrant was against the defendant, Porter, and one Benjamin Clay, and the plaintiffs obtained a judgment against both the defendants, from which the defendant Porter appealed to the county court, where a motion was made by the plaintiffs, that the appeal should be dismissed, because it was taken by only one of the defendants to the judgment. This motion was refused, and, from the order of refusal, the plaintiffs appealed to the superior court, where the defendant moved to dismiss the appeal of the plaintiffs. The presiding judge overruled the motion and ordered a writ of *procedendo* to issue to the county court, directing that court to dismiss the defendant's appeal, and from this last order the defendant prayed and obtained an appeal to this Court.

*Clarke*, for the plaintiff.
No counsel for the defendant.

BATTLE, J. That one defendant, in a joint judgment against two or more, cannot appeal without his co-defendants, has been settled by many decisions in this Court, one of which has been made at this term. *Smith and Shuford* v. *Cunningham*. The motion made in the county court, to dismiss the appeal of the defendant from that court, ought therefore to have been granted, but having been refused, could the plaintiffs appeal immediately from the order of refusal, or were they bound to wait until a final judgment was rendered against them? The question arises upon the act of 1777 (Rev. Stat., Ch. 4, Sec. 1) which provided, that "when any person, either plaintiff or defendant, or who shall be interested, shall be dissatisfied with the sentence, judgment or decree of any county court," he may appeal therefrom to the next superior

court. Were the question an open one, there might be some doubt, whether the sentence, judgment or decree of the county court, from which the appeal may be taken, is not a final, and not merely an interlocutory one, but a contrary construction has been put upon the act, and we do not feel at liberty to depart from it. In the case of *Hunt* v. *Crowell*, 2 Murph. Rep., 424, it was held by a majority of the court, that an appeal might be taken from an interlocutory order of the county court, granting leave to amend. So in the case of *Harvey* v. *Smith*, 1 Dev. & Bat. Rep., 186, it was held, not only to be competent, but the proper course, for a party dissatisfied with the sentence of the county court, ordering the re-probate of a will to appeal at once from such order, without waiting for the final sentence upon such re-probate. But it is not every order, which the county court may make in the progress of a case, that is the subject of an appeal; Chief Justice TAYLOR, in delivering his opinion in *Hunt* v. *Crowell*, admits this, but says that, "whenever the question presented to the county court is such, that a judgment upon it one way would put an end the cause, it may be appealed from." We are disposed to adopt that rule, and it is decisive of the case before us. If the motion, made in the county court, had been granted, it would have put an end to the case, but, being improperly refused, the plaintiff had a right immediately to appeal from the order of refusal. That there are some inconveniences, attending the allowing of appeals from interlocutory orders of the county court, cannot be denied. They are clearly pointed out by Judge DANIEL, in the dissenting opinion, which he filed in the case above referred to of *Hunt* v. *Crowell*, but they are greatly overweighed by the advantages of getting a decision of the superior court upon a point, which may determine the cause, without putting the parties to the trouble, expense and delay, of waiting for a final judgment, before the appeal is taken.

It was a sense of such advantage, no doubt, which induced the legislature, after providing in the act of 1818, (2 Rev. Code, ch. 962, sec. 4,) that no appeal should be allowed to the Supreme Court except from the *final* sentence, judgment or decree of the superior court, to modify the law, in relation to such appeals, by giving to the judges of the superior courts, in the act of 1831, (Rev. stat., ch. 4, sec. 23,) the power to grant appeals from interlocutory orders, upon certain terms, whenever they might think proper so to do. Upon the whole, we think, that the judgment of the superior court, refusing to dismiss the plaintiff's appeal and ordering a writ of *procedendo* to issue, directing the county court to dismiss the defendant's appeal from that court, was right and ought to be affirmed.

PER CURIAM. Judgment affirmed.

JAMES COWAN to the use of GEORGE M. SHUFORD v. AMOS MCNEELY.

A suit was pending on a note executed by A. & B. B. had died and A. administered on his estate, and the suit was against him personally and as administrator. The following order was made: "Referred to (C. & D.) to take an account of the estate of (B.) and to award, and, if they cannot agree, to choose an umpire, and their award to be a rule of court." The referees returned the following award: "This cause having been referred to us to take an account of the administration of the said, (A.,) and to make an award in the matters in controversy, we find, in taking the said account, that the amount of vouchers in the hands of the said (A.) exceeds the amount of receipts, with which he is chargeable, by the sum of $513.62, &c. Finding therefore, that the administrator has no assets, we award that the plaintiff pay the costs of this suit;

*Held*, that the only matter submitted to the referees was the amount of the assets of (B.) in the hands of, (A.,) and that their award as to any other or further matters was void.

Appeal from the Superior Court of Law of IREDELL County, at the Spring Term, 1846, his Honor, Judge *Caldwell*, presiding.

The case is: McNeely, the defendant, executed a note to the plaintiff and signed it, "McNeely & Rumple." Rumple died, and McNeely and Joseph Rumple administered on his estate. The action is brought on the note against McNeely in his own right, and against him and Joseph Rumple, as administrators of Eli Rumple, the deceased. In the progress of the case, while pending in the county court, the following order was made: "Referred to James E. Kem and Jury Clark to take an account of the estate of Rumple, and to award, and, if they cannot agree, to choose an umpire, and their award to be a rule of court." The referees returned into court the following award: "This cause having been referred to us to

take an account of the administration of said McNeely, and to make an award in the matters in controversy, we find, in taking the said account, that the amount of vouchers in the hands of said McNeely exceeds the amount of receipts with which he is chargeable by the sum of $513.62, the further amount of $575.18 having been paid by said administrator upon unliquidated accounts, and, therefore, not admitted as vouchers in this suit. Finding, therefore, that the administrator has no assets, we award that the plaintiff pay the costs of this suit." This award was set aside in the county court, from which judgment the defendant appealed, and, in the superior court, the presiding judge was of the opinion that "the submission was confined to the liability of the defendants, McNeely and Rumple, as administrators, upon the plea of fully administered, and that the personal liability of McNeely was not referred or included in the award, and so considering, the decision of the county court was ordered to be reversed and judgment entered according to the award, in favor of the said administrators, leaving the personal liability of said McNeely subject to further trial." The defendant McNeely appealed to this Court.

*Craig*, *Avery* and *Thompson*, for the plaintiff.
*Clarke*, for the defendants.

NASH, J. In the superior court the motion of the defendant, in substance, was for a judgment upon the award, upon the ground that the award had decided that he was not bound to pay the debt. This motion the presiding judge refused, because, by the submission, the arbitrators had no power to enquire into his personal responsibility. Though the order was very loosely drawn, we agree with his Honor that the question was not within the order of reference, and therefore, there was nothing upon which

the defendant could ground his motion. His Honor was correct in reversing the judgment of the county court, setting aside the award. They had no power to do so. The parties were entitled to the benefit of it, as far as it was legally made. The court having refused to render judgment for the defendant on the award, left the case for trial as in any other case. We do not concur in the opinion, giving judgment at that time for the administrators upon the award, and leaving the case, as to McNeely's personal liability, to be tried thereafter. There cannot be a final judgment upon one part of a case at one time, and upon another part at a different time. This question, however, is not directly before us, and we affirm the judgment in the superior court, refusing the motion of the defendant, because the court had no power or authority to grant it, for the reason it gave. Let this opinion be certified to the court below.

PER CURIAM. Ordered accordingly.

WILLIAM PATTON v. JAMES BRITTAIN.

A man gave authority to an agent to purchase some personal property, but only so far as he had cash of the principal, with which he was to pay for it. The agent purchased on the credit of his principal, without paying any money, and the property was delivered to the principal, who received it and converted it to his own use; *Held*, that the vendor had a right to recover from the principal the price of the goods.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1847, his Honor, Judge *Settle*, presiding.

This was an action of assumpsit for the price of a parcel of salted hides, sold and delivered by the plaintiff to the defendant. Plea, *non* assumpsit; and upon the issue thereon joined, the case was tried at Henderson on the fall circuit of 1847.

The plaintiff first offered in evidence an order, written and signed by one James J. Bates, in the following words: "Charleston, 26th January, 1844. Mr. William Patton: please send to the railroad to-morrow, 1,000 pounds of hides, averaging 35 to 40 lbs. as near as you can, to be conveyed to Smith & Benson, Hamburg, to be forwarded to James Brittain, Henderson, with some hides and oil, which will be there.

JAMES J. BATES & CLAYTON."

He next introduced a witness, named Clayton, who testified, that about the 1st of January, 1844, the defendant placed in the hands of Bates, who was going down to Charleston, two hundred dollars in money, and some notes due there, with instructions to collect the notes, and with the money, which he then handed to him, and that which he might collect, to purchase for him some hides, oil, &c.,

but not to exceed the amount, which he might have in cash; that Bates went to Charleston and collected some of the notes, and made purchases for the defendant, among which was that of the salted hides, for which this suit was brought; and, upon his return, he and the defendant had a settlement, in which the defendant accounted with him for all his purchases, that of the salted hides included, and received from him the notes not collected, and returned to him the receipt, which he had previously given for the money and notes.

This witness testified further, that, after this settlement, the defendant informed him that he had received a letter from the plaintiff, stating that 1,002 lbs. of salted hides, at 10 cts. per pound, had been forwarded to him, and that he should look to him for payment. The plaintiff then produced a letter from the defendant, dated 24th February, 1844, in the following terms: "Dear Sir: I received a note from you, stating I was due for a lot of hides bought for J. J. Bates the 29th January. I am sorry to say there is so little confidence in man. The fact is, Mr. Bates had my money in his pocket to pay for all the hides and oil that he bought—therefore you may infer he bought the hides of you and used the money to his own use. I saw him a few days since, and told him I had received a note from you on the subject; his answer was, he would remit the money forthwith."

The plaintiff then introduced testimony to show that the lot of hides had been sent by the railroad cars to Hamburg, directed to Smith & Benson, of that place, and then offered in evidence the deposition of Mr. Benson, in which it was stated that the hides were received by the firm of Smith & Benson, on the 31st of January, 1844, to be forwarded to the defendant, and that they, on the 10th of February following, delivered them, together with twenty-four other hides and one barrel of oil, to one A. McCadle, to be carried by his wagon to the defendant, and they were

paid the freight and charges on the said hides by the wagoner. The plaintiff then proved that the usual time required for loaded wagons to travel from Hamburg to Henderson county, where the defendant lived, was nine or ten days, and closed his case. The defendant offered no testimony.

The counsel for the defendant contended, and called upon the court so to charge the jury, that, if the hides were sent to the defendant on the faith of and under the directions contained in the order, read in evidence, the presumption in law was that the credit was given to Bates & Clayton. And if this were not so, that, then, if the hides were forwarded by the railroad to Hamburg, stored with the commission merchants, and delivered at that place to the defendant's wagon, at the defendant's charge and expense, before he received notice from the plaintiff that the hides had been purchased on a credit, and the credit given to the defendant, the plaintiff was not entitled to recover. The court declined giving the instructions as prayed, but charged the jury that, if they believed from the testimony that the plaintiff gave notice to the defendant that the hides had been purchased by his agent, Bates, on a credit, and that the credit had been given to the defendant, and that this notice had been given by the plaintiff and received by the defendant, before he either received the hides in Henderson or settled with his agent, Bates, the plaintiff was entitled to recover. But if they were of opinion that the defendant had either settled with his agent, Bates, or had received the hides in the county of Henderson before notice was given to him by the plaintiff that Bates had bought the hides from him as agent of the defendant, on credit, then they should find for the defendant. A verdict was returned for the plaintiff, when the defendant moved for a new trial, on the ground that the court had misdirected the jury. This

motion was overruled, and a judgment given for the plaintiff, from which the defendant appealed.

*Gaither* and *Avery*, for the plaintiff.

*J. W. Woodfin* and *Baxter*, for the defendant.

BATTLE J. The question presented for our determination in this case is one of some practical importance, but not of much difficulty. There is no doubt that the defendant was not bound by the contract for the purchase of the hides made by his agent, because the agent had exceeded his authority in purchasing upon credit instead of paying cash, as he was expressly directed. This is fully established by the authorities referred to and relied upon by the defendant's counsel. 1 Chit. Pl., 40; Com. on Cont., 223. The principal, then, had a perfect right to repudiate the contract and refuse to receive the articles, but not having done so, it is equally clear that, by receiving the hides and appropriating them to his own use, after notice from the plaintiff that they had been purchased for him and upon his credit, he ratified the contract, made on his behalf, and became bound to pay for them. And this result would have been the same whether Bates acted contrary to his authority, exceeded it, or had none at all. It is the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive them and pay for them. He may refuse them if they have been sent without his request: but, if he receive them, he must pay the price. But it is contended that the defendant received the goods before notice that they were sent upon his credit, at Hamburg, by the delivery to the commission merchants, or at least to the wagoner, who carried them to his place of residence in Henderson county. That cannot be so, for there is no evidence that the commission merchants or the

wagoner were his special agents to receive the goods for him. There was, therefore, no delivery of them to the defendant until they were carried to him in Henderson. Until that time they were merely *in transitu*, in the hands of common carriers, and he had the option to receive them or reject them. Having done the former, it is but common justice that he should pay for them. The dishonesty of his agent in embezzling his money must fall upon himself and not upon an innocent person, who never trusted the agent.

In coming to the conclusion that the defendant is responsible for the price of the hides, we have not been at all influenced by the consideration that he had notice that he was looked to for payment before he had the settlement with his agent. That circumstance did not in any manner affect the plaintiff's right to recover, provided the notice that credit was given to him reached his hands before the goods were received by him, because the plaintiff had done nothing to change the relation between him and his agent before that time. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

DANIEL SHAVER v. PETER ADAMS, et al.

Where a partnership was about to be formed, and one, who was to be a member, purchased a chattel, which was afterwards used by the firm, and agreed by them to be taken from him, upon his retiring from the business, and the note he gave for the chattel was, in consequence of this agreement, surrendered to him; *Held*, that the other partners were bound to pay the original vendor.

The case of *Cooper* v. *Chambers*, 4 Dev., 261, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Spring Term, 1848, his Honor, Judge *Manly*, presiding.

The case is as follows: The defendant and one Bencini entered into a partnership, to run a line of stages between the city of Raleigh and Salisbury. Afterwards, and before the company commenced operations, Bencini purchased, for the use of the firm, from the plaintiff, a carryall wagon at the price of $100—for which he gave his note. This carryall was subsequently put by Bencini into the stock, at the price he was to give, and it was used by the firm a short time thereafter. Bencini, becoming embarrassed in his circumstances, sold out his stock to the other partners, the defendants. In the settlement of their accounts, he told the defendants, he was not entitled to any credit on account of the carryall, as he had not paid for it, and it had been purchased for the firm, and devoted to their use, and it might be considered the common stock. To this the defendants assented, and the wagon was accordingly taken by them, and was worn out in their service. The agent of the plaintiff afterwards presented the note to McLean, one of the partners, and demanded payment,

who answered that it must and should be paid, and subsequently he declared to the agent of the plaintiff the amount was due, and should be paid. The note was subsequently surrendered up to Bencini.

On behalf of the defendant it was argued, that the promise of the defendants was a promise to pay the debt of another, and, not being in writing, was void under the statute against frauds, Rev. St., ch. 50, and, at all events, the other partner, Adams, was not bound. Under the charge of his Honor, the jury returned a verdict for the plaintiff, and the defendants appealed.

*Ellis*, for the plaintiff.

No counsel for the defendants.

NASH, J. We do not consider the plaintiff's case as coming within the operation of the statute of frauds. The 10th section of that act declares void all promises made to pay the debts of another, when the party to be bound does not enter into some writing or memorandum, signed by him or his agent. If, therefore, we believed, that the promise, made by the defendant, McLean, was to pay the debt of another without any new consideration for it, we should not hesitate to reverse the judgment given below. We do not so consider it, but look upon it as a new original contract growing out of the one made by Bencini. The action is not upon the note given by Bencini; that was surrendered up to him upon the promise made by McLean to pay for the wagon, and he, Bencini, was consequently discharged from all liability on it. Without inquiring whether the defendants would not be liable under the first contract, as joint partners with Bencini in the purchases with him, our opinion is founded on the agreement made by the parties to take the wagon and pay the plaintiffs for it. Bencini was a copartner with the defendant in the line of stages, running between Raleigh and

Salisbury, and purchased the wagon for the use of the firm. It was by them received and used, and, when the partnership was dissolved and Bencini left it, we gather from the case that the defendants were about to credit him with the value of the wagon. Upon being informed by him, that it was not paid for, but that the plaintiff had his note for it, they agreed to keep the wagon and to pay the plaintiff for it. The contract, on which the action is brought, is an original contract between the parties upon a sufficient consideration in law. 1 William's Saunders 211, note 2; *Cooper* v. *Chambers*, 4 Dev. Rep., 261. The 2nd ground of defense cannot be maintained. The promise of one partner to pay a debt due by the firm, binds all the partners. Adams was present, when the parties agreed to receive the wagon as partnership property, and to pay the plaintiff for it.

PER CURIAM. Judgment affirmed.

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JOSEPH CORPENING, Adm'r, &c., v. H. P. GRINNELL.

Where a defendant wishes to avail himself of a certificate of discharge in bankruptcy, obtained after his pleas had been entered, he must plead it as a plea since the last continuance.

Appeal from the Superior Court of Law of CHEROKEE County, at the Spring Term, 1846, his Honor, Judge *Pearson*, presiding.

CORPENING v. GRINNELL.

This was an action of debt upon a promissory note under seal, to which the defendant pleaded a certificate of bankruptcy. The suit was commenced in the county court of Cherokee, and the pleas were entered at the June term, 1844, of that court. After a verdict and judgment in favor of the plaintiff in the county court, it was carried to the superior court, upon the appeal of the defendant, and was tried at the Spring term, 1846, when the defendant produced and read in evidence a certificate of his discharge as a bankrupt, granted by the district court of the United States, at Wilmington, on the 4th of November, 1844. The presiding judge was of opinion, that the defense relied upon could not be urged under the pleas upon the record, because the certificate of discharge was not obtained, until after they were entered. He held further that the certificate of bankruptcy ought to have been pleaded by the defendant, as a plea since the last continuance.

The plaintiff had a verdict and judgment, and the defendant appealed.

*J. W. Woodfin*, for the plaintiff.
*Francis*, for the defendant.

BATTLE, J. We entertain no doubt of the correctness of the opinion expressed by his Honor in the court below. A plea must be true at the time when it is pleaded, and it cannot avail the party by becoming so at a subsequent time, but before the trial of the issue. If any matters of defense arise, after the term of the court, when, according to the regular course of practice, the party must enter his pleas, he must plead it *puis darrein continuance*, not in bar of the action, but to the further prosecution of the suit. Such is clearly the general rule, and the plea of a certificate of bankruptcy forms no exception to it. 1 Steph. N. Pri., 697, 698. Eden on Bankruptcy, 426.

*Langmead* v. *Beard*, cited in 9 East Rep. 85. *Tower* v. *Cameron*, 6 East, 413 ; 2 Chitty's Plead., 427. These authorities relate more particularly to the English law of bankruptcy, but they are equally applicable to the "act to establish a uniform system of bankruptcy throughout the United States." For that act merely declares, in the 4th section, that a discharge and certificate, when duly obtained under it, "shall and may be pleaded, as a full and complete bar to all suits brought in any court of judicature whatever," leaving the time and manner of pleading such discharge and certificate to be determined by the rules of pleading, theretofore established. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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THE STATE v. ELIJAH PHIPPS.

At the common law no trespass on chattels was an indictable offence without a breach of the peace; that is, either the peace must be actually broken or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will.

The case of the *State* v. *Flowers*, 2 Mur., 225, cited and approved.

Appeal from the Superior Court of Law of ASHE County, at the Fall Term, 1847, his Honor, Judge *Pearson*, presiding.

The indictment is for a forcible trespass in killing a dog, the property of James Perry. The jury returned a special verdict, which is as follows: The jury find, that, on the 10th day of March, 1847, near the dwelling house of James Perry, in the county of Ashe, Lugena Ann

Perry and Franky L. Perry were in the possession of a dog; that the defendant was approaching the house, when the dog rushed at him and attempted to bite him: that with much difficulty he kept the dog off, by means of his gun: that Lugena and Franky L. Perry, who were a short distance from the dog, but not in sight, the view being obstructed by the corner of the house, hearing the dog bark, immediately came round, and with a stick drove the dog away; that, as the dog was retiring, and at the distance of about seven steps, the defendant fired and killed him in their presence. The jury find that the defendant was on good terms with the said Perry, the said Lugena and Franky L. Perry, and came to the house of Perry on a friendly visit, and at no time, either before, during or after the rencounter with the dog, manifested any ill feeling towards the said Lugena and Franky Perry, or attempted in any way to intimidate or alarm them; that he carried his rifle, with which he shot the dog, as is the custom in that county, for the purpose of killing such game, as he might meet with in passing through the mountains: that the said Lugena and Franky L. Perry, one of whom was about thirteen and the other about eleven years of age, were much excited and alarmed by the scuffle with the dog and the explosion of the gun: that the dog was killed against their will, he being a great favorite in the family, but he was fierce and in the habit of attacking strangers, both abroad and at home, and only to be kept off by a blow with a weapon or the call of his master: that Perry and his wife were both out in the field at work, when the dog was killed. Whether according to these facts is the defendant guilty or not guilty, the jury are ignorant and pray the advice of the court. If the court be of the opinion he is guilty, they find him guilty; if the court be of the opinion he is not guilty, the jury find him not guilty.

The court was of the opinion that the defendant was not guilty, and gave judgment for him, from which judgment the solicitor appealed.

*Attorney General*, for the State.
No counsel for the defendant.

NASH, J. We see no error in the judgment of the court below. At the common law no trespass to chattels was an indictable offence, without a breach of the peace. Not that an actual breach must be committed, but something more must be done than what amounts to a mere civil trespass, expressed by the terms *vi et armis*. The peace must be actually broken or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. In the case of *Mills*, 2 Dev., 420, the Court in their opinion use the expression "in the presence of the party," &c. It is manifest the owner is meant, for in the succeeding sentence they say "where they neither put the owner in fear nor provoke him to an immediate redress of his wrongs, nor excite him to protect the possession of his chattels, by personal prowess—and none of these can happen in the absence of the owner and his family—the trespass is not indictable." The special verdict shows, that James Perry and wife were absent in the field at work, and it does not show that any member of his family was present. *State* v. *Flowers* and *Hampton*, 2 Murphy, 225.

PER CURIAM. Judgment affirmed.

DEN on demise of DANIEL JONES v. GEORGE AUSTIN.

If the jury can collect from the testimony, that the description of land, levied on by a constable under a justice's execution, as fully identifies it, as if the words of the act of assembly had been literally followed, the levy must be pronounced to be good.

Where the return of a constable of a levy on land, under an execution from a justice out of court, does not state that there was a want of goods and chattels, and the court directs a *venditioni exponas*, the court must be presumed to have acted right, to have acted upon a waiver of the search for goods and chattels.

The cases of *Higgins* v. *Ketchum*, 4 Dev. & Bat., 414; *Smith* v. *Low*, 2 Ired., 457; *Morriey* v. *Love*. 4 Ire., 98; *Burke* v. *Elliott*, 4 Ire., 355; *Blanchard* v. *Blanchard*, 3 Ire., 105; *Dickson* v. *Peppers*, 7 Ire., 429; *Borden* v. *Smith*, 3 Dev. & Bat., 34, and *Henshaw* v. *Branson*, 3 Ire., 298, cited and approved

Appeal from the Superior Court of Law of ASHE County, at the Spring Term, 1848, his Honor, Judge *Manly*, presiding.

This was an action of ejectment, in which the plaintiff's lessor claimed under a sale made by the sheriff, by virtue of a writ of *venditioni exponas*, against one Zachariah Osborne, and, on the trial, he produced a justice's judgment against the said Osborne, on which an execution was issued and returned to the county court, with the following levy endorsed by the constable: "The above execution levied on the lands whereon George Austin and Jefferson Osborne now live." He then produced the record of the county court, showing that an order had been obtained for the sale of the said lands, and showed the writ of *venditioni exponas*, issued thereon, and the sheriff's deed to him as purchaser. He then introduced testimony to prove, that the defendant, George Austin, and Jefferson Osborne lived upon the land sued

for, at the time, when the aforesaid levy was made, and that the defendant was in possession when the declaration was served upon him, it being admitted that he claimed under Zachariah Osborne.

The defendant contended, that the levy on the justice's execution was void, because it contained an insufficient description of the land, upon which it was made, and that the county court had no power to make an order for the sale of the land, because the constable's levy did not state that there were no goods or chattels to be found; and that for these defects the purchaser under the *venditioni exponas* had acquired no title. The court instructed the jury upon the first point, that if they could collect from the testimony, that the description of the land in the levy as fully identified it, as if the words of the act of assembly had been literally followed, then the levy would be good; and, upon the second point, the court charged, that, as the court made the order for the sale of the land levied upon, and a writ of *venditioni exponas* issued thereon, the sale made by the sheriff under it was valid, and the purchaser acquired a good title. Under these instructions the plaintiff obtained a verdict and judgment, and the defendant appealed.

*Guion*, for the plaintiff.
*Clarke*, for the defendant.

BATTLE, J. We think that the instructions of his Honor were correct, upon both the points made in the cause. Upon the first, they are fully sustained by the cases of *Higgins* v. *Ketchum*, 4 Dev. & Bat. Rep., 414; *Smith* v. *Low*, 2 Ire. Rep., 457; and *Morrisey* v. *Love*, 4 Ire. Rep., 78. And the testimony, that the lands levied on were in the occupation of the persons mentioned in the levy, at the time when it was made, having satisfied the jury, that such were as fully identified as if the words of the act had

been literally pursued, the judgment is not erroneous, and cannot be reversed on that account.

The instructions upon the second point are equally sustained by the principle decided in the case of *Burke* v. *Elliott*, 4 Ire. Rep., 355. There it was held, that a judgment of the county court upon a justice's execution, returned levied on land, under which judgment there were an execution and sale of the land, precluded by collateral enquiry into the regularity of the previous proceedings; as for instance whether the officer, who made the levy and return, was legally appointed, or whether notice of the levy and return had been given to the defendant in the execution. Of the same kind is the alleged irregularity in this case, that the levy does not set forth, that it was made upon the land for want of goods and chattels. It is true that when the land is not sufficiently identified in the levy itself, or in the levy sustained by extrinsic proof, as in the case of *Blanchard* v. *Blanchard*, 3 Ire. Rep., 105, and *Morrisey* v. *Love*, cited above, or where the levy is not endorsed upon the execution or upon some paper attached thereto, as in the case of *Dickson* v. *Peppers*, 7 Ire. Rep., 427, the order of condemnation made by the county court will be void, because there is no land to which it can properly apply, and which the sheriff can be authorized to sell, under the writ of *venditioni exponas*. It is also true, that when notice is not given to the defendant in execution, previous to the motion for the order of condemnation, or where the defendant appears and objects to the order, because the levy shows that it was made upon the land, without stating for want of goods and chattels, or if any of such had been levied on, without showing what has been done with them, the orders ought not to be made. *Borden* v. *Smith*, 3 Dev. & Bat. Rep., 34; *Henshaw* v. *Branson*, 3 Ire. Rep., 298. But when the order is made, then the court must be presumed to have acted rightly, to have acted upon an admission

or waiver of notice, or a waiver of the search for goods and chattels, or of an account of those, appearing to have been levied on, before the levy was made upon the land. No collateral enquiry can then be made into the regularity of the order; that is, an enquiry not made in a proceeding instituted by the party expressly for the purpose of having it set aside for irregularity or reversed for error. And until thus set aside or reversed, it will sustain any right acquired under it, and therefore will sustain the title of a purchaser, at a sale made under an execution issuing upon it. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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FREDERICK DOVER v. PETER PLEMMONS.

Where a man contracted to work for another for six months, at eight dollars a month, and the hirer at the expiration of four months refused to pay the hire for those months, alleging that he was not bound to pay until the expiration of the six months, upon which the laborer refused to work any longer; *Held*, that the laborer was entitled to recover for his four months' work.

When the judge charges, in an action for work and labor done, that work done on the land of the hirer, "was necessarily beneficial," he erred, if he stated that as a principle of law, and, if he stated it, as a matter of fact, he erred, because he had no right to state his opinion upon the matter of fact.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Spring Term, 1846, his Honor, Judge *Pearson*, presiding.

This is an action of assumpsit for work and labor done. The case is: the plaintiff, in the spring of 1842, agreed with the defendant to work on his farm for six months, and the defendant agreed to pay him eight dollars a month for his work, one-half in trade and the other half in cash—and the plaintiff was to find himself. The plaintiff worked four months, at the end of which time, he demanded the pay for the work he had done—which the defendant refused, insisting he was not bound to pay anything, until the whole six months' work was done—whereupon the plaintiff refused to work any more. Afterwards, in the fall, the defendant agreed, if the plaintiff would clear three acres of ground for him, he would take that, in the place of two months' work, which had not been done under the original contract. To this the plaintiff agreed. The three acres were marked off and the plaintiff was to clear it by grubbing, &c. After the plaintiff had cleared (as he alleged) according to contract, he called on the defendant for his pay, who refused. This was a short time before the warrant issued, in May, 1843. It was proved the ground was not cleared agreeably to the contract in several particulars. The defendant did not fence and cultivate it until the spring of 1845; and it was not proved when he hauled off the wood or split up the timber for rails. The defendant's counsel moved the court to instruct the jury, that the plaintiff could not recover upon the first contract, because he did not work the whole six months, nor upon the second, because he had not cleared the ground as the contract required; that he could not recover upon the common counts, either for the value of his four months' work, or for the value of what work he had done in the clearing, for his right to compensation, in regard to each, was made to depend upon the clearing being done according to contract, which was not proven, or upon its being received or used by the defendant as to

which, there was no proof until after the action was brought.

The presiding judge charged the jury that the plaintiff could not recover upon the first or second contract, not having performed his part of either; that, taking the first contract, unconnected with the second, although the time of service was six months, yet, as the plaintiff was to be paid $8 per month, the defendant had no right to refuse to pay any part, until the expiration of the whole time, and the demand of the plaintiff for his four months' service having been refused, he would have had the right to consider this refusal as a wrongful act of the defendant, which put an end to the contract, and gave him a right to sue for what was due him for the four months' work; that taking the two contracts together, the effect of the second was to substitute the clearing of the ground, in the place of the two months' work which was unperformed; that the plaintiff had a right to recover the four months' service, which he had performed, although he had not made the clearing according to the contract; and also whatever his work was reasonably worth to the defendant, &c.

The court believed the distinction to be, that where work is done, but not in compliance with the contract, and the work may or may not be of benefit to the party, no action will lie for the value, until it is accepted or some use made of it; but where the work, being in and upon the land of the party, as in this case, must necessarily be of some benefit, as soon as it is done, there the law implies a promise to pay its value, &c.

Verdict and judgment for the plaintiff, and appeal.

*J. W. Woodfin*, for the plaintiff.

*N. W. Woodfin*, for the defendant.

NASH, J. The plaintiff's declaration contains several

counts—the first, upon a special agreement, and one, for work and labor done. We concur with his Honor in that portion of his charge, wherein he instructs the jury, that the plaintiff is entitled to recover for the four months' labor performed by him—but we differ with him as to the law governing the services as to the clearing. The charge upon that point is, "that the work being rendered in and upon the land was *necessarily* beneficial to the owner." This is a novel principle to us. We do not perceive why its being done in and upon the land must render it necessarily beneficial to the owner. Many cases might be put, in which it would not be. One is in the instance put by Justice LEBLANC in *Baston and Butler*, 7 East., 479. A carpenter is employed to build a house upon the land of another; he does build it—but it falls down the day after it is delivered. Another case will afford a familiar instance of the want of correctness in the principle stated. A ditcher is employed to dig ditches to drain a particular piece of land; he does the work, but in a manner so unscientific, that it does not drain the land at all, but, on the contrary, renders the ground more wet by conducting water to it, instead of taking it off. Where is the benefit to the owner of the land in either case? Yet the work was done in and upon the land, and in the latter case the land must be drained by ditching before it can be used.

The proposition, then, is not true. If it was intended to instruct the jury, that the law implied that the work so done *on* the land was *therefore* beneficial; we answer, we know of no such principle of law. If it was intended to instruct them, that such was the fact, then his Honor invaded the province of the jury. And in either case the charge is erroneous. In an action upon a special agreement, the plaintiff must shew that he has performed the work as specified, or he cannot recover, either upon the special contract, or upon a count for work and labor done;

but if the work, when done, is received or used by the defendant, and he thus derives a benefit from it, he must pay *pro tanto* for it. If the defendant refuses to receive the work, because of its insufficiency, or because of a deviation, the plaintiff cannot recover upon a *quantum meruit*. *Ellis* v. *Hamlin*, 3 Taunton, 52. 1st Leigh's N. P., 77. In this case, the clearing of the land was substituted for the two months' work, not performed under the first contract. And it is admitted that the clearing was not done in the manner stipulated, and that the defendant had not received or used it, at the time the action was brought, nor for nearly two years after.

We regret sending the case back to another jury. The plaintiff is clearly entitled to recover for the four months' service performed by him, but nothing for the clearing.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

# CASES AT LAW,

ARGUED AND DETERMINED IN

# THE SUPREME COURT

OF

# NORTH CAROLINA,

## AT MORGANTON.

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AUGUST TERM, 1849.

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THE STATE v. JAMES RAY, sen., et al.

The statement of the case by the presiding judge is, in our practice, a substitute for a bill of exceptions, which sets forth the errors complained of. If no such statement accompanies the appeal, and no error appears on the record, the judgment will be affirmed.

Appeal from the Superior Court of Law of ASHE County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

*Attorney General*, for the State.

No counsel for the defendants.

NASH, J. This Court is a court of errors to rectify errors in law, and it is a settled rule to affirm every judgment appealed from, which is not erroneous. The statement of the case by the presiding judge is, in our practice, a substitute for a bill of exceptions, which sets forth the errors complained of. If no such statement accompanies the case, it is our duty to pronounce such judgment upon the record, as the court below ought to have done. No such statement accompanies this case. We have looked through the record carefully, and perceive no error in it. The judgment below, not being shown to be erroneous, must be considered correct in point of law, and must be affirmed.

PER CURIAM. Judgment affirmed.

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THE BUNCOMBE TURNPIKE COMPANY v. AMBROSE MILLS.

Under the charter of the Buncombe Turnpike Company, tolls are only demandable at the gates erected on the road. Therefore, a person, who passes on the road from one point to another, between which there are no *gates*, is not liable for any toll.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

The action was brought to recover certain tolls, alleged to be due from the defendant, for passing on the plaintiffs' road, and through a toll-gate erected thereon.

The company was incorporated in 1824, for the purpose of making a turnpike road from the Saluda Gap, then

in Buncombe county, and on the South Carolina line, by Asheville, and other designated points to the Tennessee line. Among the provisions of the charter are the following: That the company may demand and receive certain tolls at some convenient toll-gates to be by them erected, not nearer than ten miles to each other—among which are tolls on travelers on horseback and on horses without a rider: That, as soon as any part of the road, not less than ten miles in extent, should be made, the company might erect a toll-gate thereon and collect one-seventh of the whole tolls imposed by the act, and in like proportion for a greater extent of road: That, is any person shall refuse to pay the tolls, at the time of offering to pass the place, designated for their collection, and previous to passing the same, the toll-gatherers may refuse such persons a passage; and that, if such persons shall pass or drive through without paying the toll, he may be proceeded against before any tribunal having jurisdiction: That the road shall be a public highway, free for the passage of all persons, animals and carriages, on payment of the tolls imposed by the act; and that no gate shall be erected within three miles to the south of Asheville.

The road was constructed through the whole line mentioned in the act, being, it is said, about seventy-five miles in length. Three toll-gates were erected on it, of which one was near each extremity; and the third about midway of the road, being a short distance west of Asheville, and, by a resolution of the company, the tolls, allowed by the charter, were payable at each of the gates in equal proportion. The defendant was passing, with a number of horses, from Tennessee into North Carolina, and, with a view to avoid paying tolls on the turnpike, he traveled by other roads in the state, generally running nearly parallel to the turnpike, and at one point approaching it within half a mile, and he did not touch the turnpike, before it reached Asheville; but, at that place, the defendant got

on the turnpike, thus avoiding the gate near it, and he then traveled on the turnpike to the south-east about ten miles, when he was arrested, in this action, for the tolls, alleged to be due at the middle gate. Upon the general issue pleaded, the presiding judge ruled, that the plaintiff could not recover, and, from a nonsuit there was an appeal.

*N. W. Woodfin*, for the plaintiffs.
*Edney*, for the defendant.

RUFFIN, C. J. The Court is of opinion that the judgment should be affirmed. As the case is stated, it seems to have been the object of the suit to recover the one-third of the toll, which according to the resolutions of the company, was demandable at the middle gate, if the defendant had passed through it; but the claim, in that form, is not sustained by the facts, since the defendant did not pass through that gate, nor, indeed, enter the road, until he reached Asheville, which is to the east of that gate. As he did not use the road, west of Asheville, it would seem the defendant could not, upon any principle of justice, be chargeable for toll, between the gate near that place, and the western termination of the road. It was admitted in the argument, that such is the law in respect to a person, who, *bona fide*, came to Asheville, in the first instance, on business at that place, for example. But it was contended, that the defendant practiced a fraud upon the company, by traveling his way in the immediate vicinity of this road, until he got beyond the middle gate, and then entering the road, because, thereby, he avoided paying two-thirds of the toll and was enabled to use one-half of the road, upon paying one-third of the toll, if he went to the third gate, and without paying anything, if he went off the road before getting to that gate. The Court, however, cannot view the subject in that light.

By refraining from going on the turnpike, between Tennessee and Asheville, the defendant was guilty of no fraud on the company, but was only exercising his own legal right. The law compels no one to use the road, but only gives the company the right to a toll from those who do use it. Every one is free to travel such ways as he may choose and find; and it is naturally to be supposed that he will go on those which are common, unless he find it to his advantage to travel on the turnpike, even at the expense of the tolls. Then, the defendant neither used the road nor was bound to use it; he incurred no liability for tolls at the gate of west of Asheville, or between it and Tennessee. If, indeed, the defendant had travelled the road from the Tennessee line to Asheville, going off, when near a gate, and re-entering the road on the other side of the gate and out of sight of it, as a trick to avoid paying tolls by not passing through the gate literally, while he had the benefit of the road, the consequence might, perhaps, as it seems manifestly just that it should, be different. But here that point does not arise, as the defendant was not on that part of the road at all, and it could not be the intention of the act, that the citizen should, in any case, be liable for tolls in respect of a section of the road on no part of which he travelled. Up to the middle gate, then, we think that the defendant did nothing on which a demand for tolls arose to the plaintiff.

It was, however, contended further, that tolls *pro rata* are due for the distance which the defendant actually travelled, and that the jury should have been allowed to apportion them. It would seem to be a sufficient answer to that position that the plaintiff did not ask to have the case thus put to the jury, as the claim was specifically for the tolls demandable at the middle gate, namely, one-third of the whole tolls. But, without adverting to that matter, we think that the company cannot apportion the toll, so as to recover, in an action, what they could not

demand on the road on pain of refusing passage to the traveller. For, although it be generally true that *indebitatus assumpsit* will lie for the value of a benefit derived by one from the labor or property of another, yet the present case is unaffected by that principle. The demand of the plaintiff is not one of the kind supposed. It is not founded on a *quantum meruit* or *quantum valebat*, but it is for certain specific tolls, which are demanded, by virtue of a grant of the franchise to the plaintiff, as a corporate body. The tolls cannot, on the one hand, be diminished by shewing, that they are more than a just compensation for the service. So, on the other hand, no higher or other compensation can be claimed than in the form of the tolls granted and demandable and payable at the places and in the manner specified in the grant. The question, therefore, turns upon the terms of the charter, and, from the parts of that instrument set forth in the case, it seems clearly to have been the intention of the legislature that the company should not be entitled to claim tolls, but at the gates and toll houses erected for that purpose. The grant is that tolls may be demanded at convenient gates, which are to be situated at the pleasure of the company, provided that one shall not be erected within three miles of Asheville, and that one gate is not within ten miles of another: and there is no authority expressed for taking tolls at any point between two gates. Indeed the implication is strong that tolls cannot be demanded at such intermediate points. The express provisions quoted, that tolls may be exacted at toll-gates, and that the gates shall not be within ten miles of each other, of themselves create that implication. It would be most inconvenient, that a traveller passing a few miles along the road, who finds no person on it, to whom he may make payment, should be subject to a toll for that distance, since, upon the general rule, he would be obliged to seek his creditor, the officer of the company, where he

could be found, and make payment or be subject to an action and its costs. The meaning is, that the tolls should be paid on demand, at certain points on the road, as they arise, and in order to give notice of those points the charter requires that they should be "designated" by "convenient toll-gates." Furthermore, it is to be observed, that the tolls, payable at each gate, are not in proportion to the distance the party may have travelled, or may intend to travel, along the road. Provisions of that kind would give rise to innumerable frauds and controversies. On the contrary, the tolls are to be apportioned according to the distances at which the toll-gates are from each other. It was only after the road was made for ten miles that a gate could be erected; but, after it was erected, one-seventh of the whole toll was demandable at that gate, without reference to the enquiry, whether the person came over all or only one of the ten miles, and the same rule is declared as to the proportion of tolls for any greater extent of road. Hence the tolls are not only demandable at the gates, and there only, but they appear to be given for passing through the gates respectively. If, for example, a traveller come to a gate, and be refused a passage, because he cannot or will not pay the toll, there is nothing to prevent his turning back without making any payment. The charter is express, that the road is a public highway for all persons who pay the tolls imposed, and hence there can be no *pro rata* toll demanded where there is no gate. That is further deducible from the clause, which forbids the erection of a gate, within three miles of Asheville, which could have been inserted, only upon the idea that no toll was due but at and passing a gate, and was no doubt intended, upon that supposition, to afford the opportunity to all persons, without paying toll, to go on the turnpike far enough to reach the several com-

mon and free roads, which branch off east or west from it, within that distance. The inference is plain, that one who does not pass through the gate, but goes out of the road between two gates, is not liable for any toll. Such, too, as we are informed by the counsel on both sides, has been the construction of the charter, which has been acted on by the company throughout its existence; this being the first instance in which a claim has ever been set up for a *pro rata* toll for passing from one point to another on the road between which there was no gate. This construction produces but little loss to the company, as they have it in their power, if found to be worth the expense, to increase the number of gates to seven. That number would be sufficient for all the purposes within the purview of the act, as the inhabitants of Buncombe, who alone may be expected frequently to travel short distances on the road, are entirely exempted from tolls, and the legislature did not mean that other travellers should be harrassed with the delays and vexations at turnpike gates oftener than every ten miles; these, however, the gates, are about thirty-five miles apart, and it was consequently the effect of the plaintiff's own omission, that the defendant was put under no obligation to pay tolls for the portion of road over which he passed.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE of SAMUEL SMITH v. LEWIS FORE.

Where a *venditioni exponas* has issued and the land mentioned in it has been sold, another *venditioni exponas* cannot issue, but if it does, it is invalid and the purchaser under it acquires no title. The proper execution, if a balance of the judgment is unpaid, is a *fi. fa.*

Where a defendant in an execution is sued in ejectment by the purchaser under that execution, he is not prevented from contesting the right to recover, unless the execution was a valid one.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Special Term in July, 1849, his Honor, Judge *Caldwell*, presiding.

On the trial of this ejectment, the lessor of the plaintiff offered in evidence a judgment of a justice of the peace, at the instance of one Poor, against the defendant, an execution thereon and a levy on land endorsed, then a memorandum on the docket of the county court, in these words, "Order of condemnation," then a *venditioni exponas* and a sheriff's deed, and proved the defendant in possession. In behalf of the defendant it appeared, that the said tract had been sold, some time before the sale of the lessor, under a *venditioni exponas*, that had previously issued on the same judgment and proceedings, and had been purchased by one John Davis, to whom the sheriff had executed a deed for the said land of older date than that under which the plaintiff claimed. For the defendant it was insisted, that the second sale was void. Other points were made, but it is not necessary to state them.

A verdict was taken for the plaintiff, subject to the opinion of the court. It was agreed, that the verdict should be set aside and a nonsuit entered, in case the court should be with the defendant on the questions reserved, or

either of them. The court directed the verdict to be set aside and a nonsuit entered, from which judgment the plaintiff appealed.

*J. W. Woodfin*, for the plaintiff.
*Avery*, for the defendant.

PEARSON, J. It is only necessary to notice one objection: as that is fatal to the plaintiff's right to recover. The lessor is a purchaser at a sheriff's sale, under a *venditioni exponas*, issuing upon a constable's levy. The land had been before sold under a *venditioni exponas* issuing upon the same levy, and one Davis had become the purchaser, and taken the sheriff's deed. This rendered the levy *functus officii*, and there was no authority to issue the second *venditioni exponas*, under which the lessor purchased. As the price given by Davis did not satisfy the debt, a judgment might have been taken in the county court, upon which a *fieri facias* might have issued.

The principle, that the debtor is not at liberty to resist the recovery in ejectment, by the purchaser at a sheriff's sale, does not apply, because the lessor has not shewn himself to be a purchaser within the meaning of that rule. Such a purchaser must shew a valid execution. The lessor has failed to do so in this case, and is not entitled to the rights of a purchaser at a sheriff's sale.

PER CURIAM. Judgment affirmed

THE STATE v. AMOS L. RAY, et al.

The offence of forcible trespass must be charged as being done with a strong hand, "*manu forti*," which implies greater force than is expressed by the words "*vi et armis*."

To constitute the offence, there must be a demonstration of force, as with weapons or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate or put in fear.

The cases of the *State* v. *Flowers*, 1 Mur., 254; *State* v. *Fisher*, 1 Dev., 357, and *State* v. *Mills*, 2 Dev., 420, cited and approved.

Appeal from the Superior Court of Law of YANCEY County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

The defendant was indicted for a forcible trespass in seizing, and, with a strong hand, taking out of the possession of one David Byrd a certain promissory note, then in the lawful possession of the said David Byrd. The jury found a special verdict, as follows: that the defendant had executed a promissory note for one hundred dollars, payable to William Ray, and by him endorsed to Samuel Fleming: that Samuel Fleming placed that note in the hands of a constable for collection: that the constable served a warrant on the defendant and cited him to appear before David Byrd, a justice of the peace for Yancey county: that the note was delivered to David Byrd, the magistrate, and was in his possession when the defendant asked him to let him look at it—that David Byrd handed the warrant, with the note inclosed in it, to the defendant—that the defendant shook the note out of the warrant, and slipped it into his pocket—that Byrd immediately requested the defendant to return the note to him—that the defend-

ant refused to return the note, saying he did not have it—that the said note was obtained from the said Byrd by the defendant through stratagem and fraud, to prevent the said Byrd from giving judgment against him upon the said note. And the jury refer the question to the court, whether in law the defendant is guilty or not guilty.

The court was of opinion with the defendant and gave judgment for him, from which judgment the solicitor for the State appealed.

*Attorney General*, for the State.

*J. W. Woodfin*, for the defendant.

PEARSON, J. We concur with his Honor, below, that the defendant is not guilty of forcible trespass. That offence must be charged, as being done with a strong hand, "*manu forti*," which implies greater force than is expressed by the words "*vi et armis*." There must be a demonstration of force, as with weapons, or a multitude of people, so as to involve a breach of the peace, or directly tend to it and be calculated to intimidate or put in fear. *State* v. *Flowers*, 1 Mur., 254; *State* v. *Fisher*, 1 Dev., 357; *State* v. *Mills*, 2 Dev., 420. The jury find that the defendant obtained the note from Byrd by stratagem and "fraud." This resembles larceny more than forcible trespass.

The Court thinks there should be judgment for the defendant.

PER CURIAM. Ordered to be certified accordingly.

BARNOT FULBRIGHT v. JAMES MCELROY.

When a witness has been summoned to attend at court, though a verdict may be rendered in the cause, yet if a new trial is granted, he is bound to attend the subsequent terms, until a final decision, without a new subpœna.

The case of *Sweany* v. *Hunter*, 1 Mur., 180, cited and approved.

Appeal from the Superior Court of Law of HAYWOOD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This was a *scire facias* against a defaulting witness, to which he pleaded that he had not been summoned. Upon the trial, the case appeared to be this: The plaintiff had brought an action against one Dillard, and the defendant was duly summoned as a witness in his behalf. He regularly attended at the different terms of the superior court of Haywood, where the action was pending, up to the fall term, 1847, when the cause was tried and a verdict rendered. Subsequently, at the same term, the verdict was set aside and a new trial granted. At the spring term, 1848, the witness, the defendant in this *scire facias*, was called, and, failing to appear, a judgment *nisi* was rendered against him for the penalty of forty dollars, given by the act of the general assembly. This *scire facias* was issued to the defendant to shew cause, why final judgment should not be rendered against him. A verdict and judgment were rendered for the plaintiff, and the defendant appealed.

*Henry*, for the plaintiff.
*Edney*, for the defendant.

NASH, J. We perceive no error in the judgment appealed from. The defendant alleges, that after the trial and verdict at the fall term, 1847, he was not bound to attend until re-summoned. The statute, which gives the penalty against a witness, duly summoned, for not attending the terms of the court, also points out his duty. It declares, he shall appear and *continue* to attend, "from time to time, until discharged either by the court, or the party at whose instance he is summoned." The plea is, the defendant was not under subpœna: the case states, he was summoned. It is pretended, he was actually discharged, either by the court or the plaintiff, at whose instance he was summoned; but it is insisted, that, by the verdict, the case was out of court and the witness legally discharged. The premises not being correct, the conclusion from them cannot be sound. By the verdict, the cause was not out of court, and, while the term continued, it was in the power of the court to reinstate it, as it was before the trial; and, after the new trial was granted, it was, to every intent, the same cause, and the defendant was bound to take notice of it, and attend under his subpœna, until duly discharged. This principle has been considered settled, ever since the case of *Sweany* v. *Hunter*, 1 Mur., 180, tried in the year 1808, upwards of forty years since.

PER CURIAM. Judgment affirmed.

ALLEN HENSON v. PHILIP W. EDWARDS.

An officer, who has an execution, is bound to levy it on the property he finds in the defendant's possession, unless he knows, or has reason to believe, that it does not belong to him, or is by law exempted from execution.

An officer having an execution, levied on a gun belonging to the defendant and sold it; *Held*, that, not knowing or having good reason to believe that it was used by the defendant for mustering, and therefore exempt from execution, he was not liable to him for taking and seizing the gun.

It was the duty of the defendant in the execution to have informed the officer, before the sale, that the gun was kept for the purpose of mustering.

Appeal from the Superior Court of Law of HAYWOOD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

In this action, the plaintiff declared in trover for a rifle gun. The defendant pleaded the general issue. The evidence was that the gun was the property of the plaintiff, and, kept by him, as arms for muster. There was no evidence of any knowledge on the part of the defendant of the purpose for which the gun was kept, but, being a constable of the county, and having a valid justice's execution against the goods, &c., of the plaintiff, he levied the same on the gun and sold it.

The defendant contended that trover would not lie, and there was a verdict of the jury for the plaintiff, subject to the opinion of the court upon that point.

The court being of opinion, that the action could not be sustained, directed a nonsuit in conformity to an agreement between the counsel, and from this judgment the plaintiff appealed.

*Edney*, for the plaintiff.

*Fitzgerald*, for the defendant.

NASH, J. The judgment of the court in this case must be affirmed: the plaintiff cannot sustain his action. The gun in question was the property of the plaintiff, and was levied on and sold by the defendant, who was a constable, to satisfy an execution in his hands. The gun was kept by the plaintiff, to enable him to comply with the requisition of the 6th section of the 73rd chapter of the Revised Statutes. At the time of the levy and sale, the defendant was ignorant of the fact. All of a man's property, both real and personal, is subject to an execution and liable to be sold to pay his debts, except such portion of it as may be exempted by some special law. And an officer, having an execution in his hands, is bound to levy it on such personal property as he finds in the possession of the defendant in the execution, unless he knows or has good reason to believe, that it is not his property, or is protected by the law. The defendant in this case, like every other citizen, was bound to know the law, that a man's arms for muster are exempt from execution; but he was not bound to know that this was the only gun owned by the plaintiff, and, if he owned others, that this particular one was used by him for the purpose of mustering. The law exempts from execution "one bed and its necessary furniture, one wheel and cards, one loom, working tools and arms for muster, one Bible and Testament, one prayer book, and all necessary school books." Rev. St., ch. 58, sec. 1. How can the officer know, for instance, what school books are reserved and what are necessary, unless he is informed by the owner, or he otherwise comes to the knowledge of the fact, either at the time he makes his levy, or at some time before the sale? The execution protected the defendant from being, in this case, a trespasser in levying on the gun, and his sale, in ignorance of the fact, for what purpose it was kept by the defendant in the execution, constituted no conversion, without which the action cannot be maintained. It was the duty of the plaintiff, if he

wishes to avail himself of the law, to have informed the officer, before the sale, of the fact, that the gun was kept for the purpose of mustering, and demanded its restoration.

PER CURIAM. Judgment affirmed.

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THE STATE to the use of H. N. BRITTAIN v. IRA D. FARMER, et al.

The person, to whom the money is due, on a claim put into the hands of a constable for collection, should be the relator in an action, brought on the official bond for a breach of his duty in relation to such claim, and not the agent of such party, though the claim had been first put into his hands, he being a constable, and having transferred it for collection to the person sued.

The case of the *State* v. *Lightfoot*, 2 Ire., 310, cited and approved.

Appeal from the Superior Court of Law of HAYWOOD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This was an action, brought by the relator upon the bond of the defendant, Ira D. Farmer, given upon his appointment to the office of constable in March, 1847, with the other defendants as sureties. The breaches of the bond, assigned by the plaintiff, were, 1st: want of diligence; 2nd, failure to pay over; 3rd, failure to return papers. Pleas—conditions performed and not broken.

The evidence was, that, soon after the appointment of Farmer, as constable, in the county of Haywood, the relator, H. N. Brittain, who was also a constable in the

same county, placed in the former's hands, a number of judgments for collection, and took a receipt in the following form, to-wit: "April 3rd, 1847, received of H. N. Brittain the following judgments to collect or return, as the law directs," (mentioning a number of them) and signed, "I. D. Farmer, Cons." It was also proved that the evidences of debt, upon which those judgments were obtained, were put by the owners of them into the hands of Brittain, for collection, as a constable, and that he at no time had, or claimed to have, any beneficial interest in any of them. It was also proved, that, before the bringing of this suit, he had assigned over all fees due to him on those judgments to William Welch, one of his creditors. There was evidence of the collection and payment over, to the plaintiffs in the judgments and persons owning them, of a considerable number of them, and evidence also as to the solvency and insolvency of the others.

The court instructed the jury, upon this state of facts, that the relator, Brittain, could not maintain a suit on the bond of the defendants, upon the relation of any one, he, Brittain, being in no sense an injured or aggrieved person, within the meaning of the statute.

The relator excepted to these instructions, and, a verdict being rendered for the defendants, appealed from the judgment thereon.

*Fitzgerald* and *J. W. Woodfin*, for the plaintiff.

*Bynum* and *Henry*, for the defendants.

PEARSON, J. The case was well argued for the plaintiff. But the argument failed to convince us, that the judge below erred, in holding that Brittain was not the proper relator. It is true, the action should be upon the relation of the person, who made the contract with the officer. But, we think, the contract was made by the owners of the judgments, through the agency of Brittain. The case

states, "that the papers, upon which the judgments were rendered, had been put in the hands of Brittain, to collect as constable, and he, at no time, had, or claimed to have, any beneficial interest in the judgments." His agency, therefore, was disclosed, and it is the same, as if the receipt had been "Rec'd of A. B. C., &c., by the hands of Brittain, the following judgments to collect," &c.

It is urged, however, that the receipt is not so worded. We admit that the receipt, as written, is *prima facie* evidence, that the contract was made with Brittain, and that the judgments were to be collected for him. But they shew, upon their face, that they do not belong to them. He executed the warrants as constable. The receipt is not conclusive evidence of the contract. It may be shewn, as was done in this case, with whom the contract was really made, and that Brittain, at no time, claimed to be the party really interested.

Again it is urged, that, as collecting agent of the creditors, Brittain had no authority to put the judgments into the hands of another constable, and that, at all events, his agency determined when his office of constable expired, so that by putting the judgments into the hands of another constable, he became responsible to the creditors, and cannot, in any point of view, be considered as doing so as their agent; and hence he should be allowed to recover in this action to enable him to meet his own liability. The creditors are not bound by this act of assumed agency on the part of Brittain. They have their election to hold him responsible, or to ratify his act and look to the present defendants. Some of them have received their money from the defendants. This ratifies the act, and, as to their judgments, the plaintiff clearly has no cause of action. Others have not received their money. If they recover from Brittain, he will then have to look to the defendants, because that will be a disaffirmance of his agency, and he will then stand in the same

relation to the defendants, as if he had claimed the judgments as his, when he put them into the defendants' hands for collection. But Brittain had not been held responsible by any of the creditors, at the time this action was brought. He had sustained no damage, and of course was not "the party injured" or "the person to whom the defendants were bound to pay." Indeed it would be unsafe for the defendants to pay him; for should the creditors ratify the contract made by Brittain for them, and sue them, they could not protect themselves, by shewing a payment to Brittain, and, should he be insolvent, would be without remedy. For ratifying Brittain's act, in putting out the papers for collection, would not confer upon him a right to receive the money, nor could the creditors, if Brittain did receive the money, hold the sureties liable on that account.

It was also contended, that Brittain, being entitled to the costs upon the judgments for serving the warrants, and his assignment to Welch not affecting his right to sue, the nonsuit, was, for that reason, improper.

Brittain's right to sue, if he had any, was not affected by the assignment to Welch, because his claim against the constable could not, in law, be assigned. *State* v. *Lightfoot*, 2 Ire., 310. But the other proposition, although plausible, cannot be maintained. Brittain was not entitled to the costs, so as to give him an interest in the judgments. They were in favor of the respective creditors not only as to the debts, but also as to the costs. By the contract the constable undertakes to collect, and the creditor is bound to pay him his costs. According to common usage, the costs are not demanded of the creditor, until after judgment. Then, if the debtor is not able to pay, the costs are required of the creditor. But the judgment is in favor of the creditor for the costs, as well as the debt, upon the supposition that they have been paid by the creditor. There is not a divided judgment, in favor of the

creditor for the debt, and the constable for the costs. It follows that the nonsuit was proper, Brittain not being interested in the judgments, even to the amount of the costs.

PER CURIAM. Judgment affirmed.

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THE STATE on the relation of REBECCA MOODY v. B. F. GOODE.

On the trial of an issue in the case of bastardy, under the act of 1836, Rev. Stat., ch. 12, sec. 4, the examination of the woman becomes full proof of the fact of paternity, and the jury is bound so to find, unless the defendant shall show the *fact* not to be so, and this he can do only by proof of impotence or non-access at such time as by the law of nature he could be the father. Evidence to show the *improbability* of his being the father is inadmissible..

The case of the *State* v. *Patton*, 5 Ire., 180, cited and approved.

Appeal from the Superior Court of Law of CLEVELAND County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This is a proceeding under the act of 1836, commonly called the bastardy act, instituted to subject the defendant to the maintenance of the bastard child of Rebecca Moody, as the father of it. On the trial of the issue, the State read to the jury the examination of Rebecca Moody and rested its case. The defendant, then, as material and pertinent to the maintaining of the negative of the issue, and rebutting the *prima facie* case, made by the State, offered to prove, that Rebecca Moody was a woman of bad character; that she lived in the house of her sister and

brother-in-law, to whom she had borne several children, and was in the habit of sexual intercourse with him; that the relator had, in conversation with divers persons, declared, that the defendant was not the father of her child, and that the defendant was a man of good character. All this testimony was rejected by the court on the ground of its incompetence, as being immaterial in sustaining the issue on the part of the defendant. There was a verdict for the State and the defendant appealed.

*Attorney General*, for the plaintiff.
*Bynum*, for the defendant.

NASH, J. We had thought, and are still of opinion, that the questions raised in this case were settled in that of *Patton*, 5th Ire., 180. There it was held, that, although the examination of the woman was, in itself, upon the trial of the issue, but *prima facie* evidence, that the defendant was the father of the child, yet in the absence of testimony, *showing that he was not*, it is conclusive of the *fact*, and the jury is bound in law to find accordingly; that the issue is given to the defendant on his demand and is emphatically his issue, and though he maintains a negative in its investigation, he is the actor, and is bound to *prove* that he is *not* the father; and, to do that, it is not sufficient for him to raise a *doubt* upon the question. We have heard nothing, upon the present occasion, to shake our confidence in the correctness of that decision, and, if it be sound, his Honor committed no error in rejecting the evidence offered, because it was immaterial to the establishment of the issue, which the defendant had undertaken to affirm, and, at farthest, could but raise a doubt as to the fact, for it might be all true and still the defendant be guilty. It has been urged, however, that such testimony was received by the judge below, who

tried *Patton's* case, and its reception sanctioned by this Court. Upon that occasion the testimony was admissible, not for the purpose of contradicting the examination, but of impeaching the oral testimony of the woman herself, who was examined as a witness in the cause. But another answer is, that it was received without objection, and his Honor, the presiding judge, left no doubt in what light he received it, by stating to the jury that even supposing her credibility *on the trial* to have been weakened or destroyed, "that did not show that he (the defendant) *was not the father of the child.*" But on examining the expression relied on, used by this Court, it will be found to apply, not to the reception of the testimony, but to the *charge* of his Honor. It has again been urged that the opinion in *Patton's* case is not sound, for two reasons: first, because it takes away from defendants the protection provided for them by the act of 1836. In this, as in any other case, it is our duty to give such a construction to a statute as will carry out the intention of the legislature. One of the rules by which this intention is to be ascertained is the mischief to be remedied. As the law stood, upon the passage of the act of 1814, the paternity of a bastard child was ascertained and fixed by the examination of the woman; so much so, that, if the child, when born, should prove to be black, the defendant had no redress in a court of law, and it was no answer to the charge that, either from age, accident or disease, he was impotent—he was bound to maintain the child. This was the evil the act of 1814 intended to remedy. And the legislature had an entire right to model the remedy, as they thought the good of the community required. They have done so by saying to the accused, you may, if you please, submit the question of your guilt to a jury, but if you do so, the burthen of showing your innocence shall be on you; for the examination of the woman shall be sufficient to convict you, unless you show you are not the father of the child—you must

show the fact. Does this leave the party where the act of 1814 placed him? Clearly not. The second objection is, that the opinion in *Patton's* case gives to the term, *prima facie*, a force and extent not contemplated by the legislature; that they meant no more, than the examination should supersede the necessity of the introduction of the woman as a witness—that evidence, in law, was not proof. It is very certain, evidence and proof are not the same, one being the cause and the other the effect. The argument of the defendant would, upon this point, be complete, but for the phraseology of the act. If the legislature intended that the examination should have no other effect than that contended for by the defendant, they would have contented themselves by simply making it evidence. They have not done so, but directed to what *extent* it *shall* be. We have no right to presume that the makers of the law did not understand the legal phrase used by them. When, therefore, they say, that the examination shall be *prima facie* evidence, they obviously must mean what common law meant, that, if unanswered, the examination fixes the paternity of the child, and the jury must find that the defendant is guilty. In such case, therefore, it is both evidence and proof. In many cases it may operate great hardships; to remedy this is the business of the legislature. To admit the testimony offered in this case would be in effect to repeal the act of 1814, and throw all the bastards of the country upon the public. But the principle adopted in that act is no novelty. It is the application of an old and familiar rule of evidence. The law presumes all children born in wedlock to be legitimate, until he who denies it establishes the contrary. This is done by showing either impotency on the part of the husband, or non-access, both of which come under the principle of a natural impossibility, that the husband could be the father. This doctrine of impotency was

established as early as the reign of the first Edward. See *Foxcraft's* case, reported in 1st Rolle's Abr., 359, and cited in the 4th part of Starkie on Evidence, 219. In the *Banberry Peerage* case, 2 Selwyn's *nisi prius*, the judges decided, that the evidence, to prove a husband was not the father of his wife's child, must be of such facts and circumstances, as were sufficient to *prove* that no sexual intercourse had taken place between them at any time, when by such intercourse the husband could, by the laws of nature, be the father of the child. Each of these defenses stands upon the same ground, that is, natural impossibility, that the husband could be the father, and nothing short of this impossibility will bastardise such issue. It was further urged in this case, that the evidence rejected had a tendency to support the defense, and was on that account admissible. If the nature of the issue, which the jury were trying, and the effect given by the act of 1814 to the examination of the woman, be considered, it will be seen the evidence could have, legitimately, no such effect, and was, therefore, properly rejected. The defendant, by his plea, denied he was the father of the child—the issue was as to that fact, and it was necessary for him to prove that he was not. It was not sufficient for him to create a doubt as to the fact. The principle was clearly stated to the jury, and it is a rule, that no facts or circumstances are admissible in evidence, unless they have a tendency to prove or disprove the issue joined. If all the rejected testimony had been received, what tendency could it have in proving, that the defendant could not be the father of the child? To give it its utmost weight, it would not go further than to excite a doubt as to the fact. Every portion of that testimony might be true, and yet the defendant be guilty. in *Lowas and Holmden*, 2 Str., 940, in which the bastardy of a child of a married woman was

the enquiry, evidence of inability on the part of the husband from disease was admitted, but the evidence, amounting to *improbability* only, was thrown out, as it was shown the husband had access to his wife. So, here, the most that could be claimed for the rejected testimony was, that it might show an improbability, that the defendant was guilty. But there is another ground, upon which the testimony, offered for the purpose of discrediting the woman, was properly rejected. She was not a witness in the case. Where the state does introduce the mother, she then stands before the jury as any other witness, as to any facts deposed to by her out of her examination. As was said in *Patton's* case, if, after her examination before the magistrate, she had been convicted of perjury, it would not take from her examination its legal effect and operation under the act of 1814.

We repeat that we see no reason to depart from the opinion expressed in *Patton's* case. On the trial of every issue in the case of bastardy, under the act of 1814, the examination of the woman becomes full proof of the fact of paternity, and the jury is bound so to find, unless the defendant shall show the *fact* not to be so. And this he can do only by proof of impotence, or non-access, at such time, as by the law of nature he could not be the father, and the testimony offered in this case was properly rejected.

PER CURIAM. Judgment affirmed.

WILLIAM W. BRADHURST v. JOHN H. PEARSON.

When the alteration of a writ, after bail has been given, changes the nature of the action, the bail is discharged.

But where in an action against two joint and several contractors, a nonsuit is entered, and afterwards the nonsuit is set aside as to one, and not as to the other, the bail of the one, as to whom the nonsuit was set aside and a verdict and judgment subsequently rendered against him, is not discharged.

A judgment *nunc pro tunc* is a judgment of the term of the court, at which the court, making the amendment, says it ought to have been rendered.

The cases of *Bryan* v. *Bradley*, Tay. Rep., 77, and *Jones* v. *Ross*, 2 Car. L. Rep. 450, cited and approved.

Appeal from the Superior Court of Law of BURKE County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This is a *sci. fa.* against the defendant, as special bail of one McElrath. The following is the case agreed : In 1840, the plaintiff sued out his writ against J. J. McElrath and A. H. Erwin, and declared against them in assumpsit, as copartners The writ was executed by the defendant, who was the sheriff of the county, and he became the bail of the defendants. The suit continued in court until the fall term, 1845, when the plaintiff was nonsuited, and the nonsuit being set aside as to McElrath, the suit was prosecuted against him and a verdict obtained, at the spring term, 1846. No formal judgment was entered up against McElrath, until the spring term, 1849, when the court on motion, ordered a judgment to be entered in the case, as of spring term, 1846. This order of the court was opposed by the counsel of the defendant. A *fieri facias* issued, returnable to fall term 1846, against McElrath, and was returned *nulla bona*,

and the *sci. fa.* was issued to fall term of that year. A verdict and judgment were rendered for the plaintiff and the defendant appealed.

*N. W. Woodfin*, for the plaintiff.

*Bynum*, *T. R. Caldwell* and *Gaither*, for the defendant.

NASH, J. On the part of the defendant it is urged, that, by the nonsuit in the original suit, at the fall term, 1845, the case was out of court; and, by setting aside the nonsuit, as to the defendant McElrath, and prosecuting the suit against him alone, the bail was discharged. The objection proceeds upon the ground, that any alteration of a writ, whereby the nature of the action is changed, after bail has been given, will discharge the bail. This is true, and for the reason that after the alteration, the action ceases to be the one to which the bail agreed to answer, but the change must be one, which alters the *nature* of the action. *Bryan* v. *Bradley*, Tay. Rep., 77. Here the action continued the same, and the obligation of the defendant, as special bail for each defendant, continued the same. It is a mistake to suppose, that the nonsuit so put the cause out of court, as finally to discharge any of the parties. Upon setting it aside, the case is reinstated, and continues the same. The order made, in setting aside the nonsuit, is in effect the same, as if it had been unconditional, and the plaintiff had *then* entered a *nol. pros.* as to the defendant Erwin. This he certainly could have done without discharging the bail of McElrath.

In this state all contracts are joint and several, and an action can be maintained against the whole or any number of the joint contractors. And, in an action of assumpsit, against two persons, the jury may render a verdict against one and in favor of another—*Jones* v. *Ross*, 2 Car. L. Rep., 450—just as in an action of tort. When,

therefore, the nonsuit was set aside, as to Erwin alone, and the suit continued on the record against McElrath, it was in law the same action.

It is further objected, that the time the *sci. fa.* issued, no judgment had been rendered by the court, on the verdict against McElrath. The case agreed shows, that the record of the spring term, 1846, was, at the spring term, 1849, of the same court, amended by an order of court, directing a formal judgment to be entered on the verdict against McElrath. It has been *repeatedly* decided that any court possesses the power to amend its own records, so as to make them conform to the truth; and that we have no right to interfere with its exercise. When so amended, it is the duty of the clerk, in whose custody it is, in giving a transcript of it, to certify it as it is amended, as if it were originally full and complete, without noticing the order to amend. That order appears upon the records of the court, at the term, when made, if a different one, and is his authority for so altering the original.

We have nothing to do with the amending order, and cannot look behind the record, as certified to us.

We see no error in the judgment below, and it must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE on the relation of EZEKIEL DOWDLE v. JOSEPH CORPENING, et al.

It is the duty of every court to make its own record, and no other court can indirectly examine into the manner, in which it is made.

A note for seventy dollars, payable in current *bank notes*, though it is not negotiable, yet comes within the jurisdiction of a single justice.

The party, with whom a constable makes the contract for the collection of a note, is the proper relator in an action on his official bond, and not the person to whom the note is payable.

The cases of the *State* v. *King*, 5 Ire., 203; *Anderson* v. *Hawkins*, 3 Hawks., 568; *Holcombe* v. *Franklin*, 4 Hawks., 274, and *State* v. *Lightfoot*, 2 Ire., 310, cited and approved.

Appeal from the Superior Court of Law of CHEROKEE County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of debt, brought against the defendant, King, as constable, on his official bond, dated 1st January, 1840, and the other defendants as his sureties, for his failing to collect claims put in his hands as constable. The plaintiff introduced the records of the county court of Cherokee, as follows, to-wit: "March sessions, 1848, ordered by court that the names of the select court, to-wit: Peter A. Summey, W. W. Pace and John Tatham, be inserted in the minutes of January term, 1840, it appearing to the satisfaction of the court that the said Peter A. Summey, W. W. Pace and John Tatham were present and presided during the term, and that this entry be made on the minutes of said term *nunc pro tunc*." At January sessions, 1840, is the following entry: "Court met, presiding, Peter A. Summey, W. W. Pace and John Tatham, Esquires —see minutes of March sessions, 1848, page 293, *nunc pro*

*tunc.* Harrison King came into court and entered into bond according to law and was sworn into office, and gave for security, Benjamin Sherrall, Benjamin Ward and N. A. Strange, it appearing to the satisfaction of the court, that said King was duly elected constable according to law." This testimony was objected to by the defendants, but was received by the court. The plaintiff then introduced a letter of the defendants, which was read by consent. He then introduced a receipt of the defendant, King, as follows, to-wit: "Rec'd 18th November, 1840, from E. Dowdle, a note on Andrew Colvard for seventy dollars, due 27th of October, 1840, made payable to N. S. Jarrat in current bank notes, which I promise to collect and pay over to the said Dowdle, or return according to law. G. H. King, Cons." The plaintiff then gave evidence of the solvency of Andrew Colvard, and that the officer, by using due diligence, might have collected the money.

The defendants' counsel objected: 1st. That the record read was insufficient to shew King's election and qualification—that the entry from the record of 1848 did not shew that any of the justices of Cherokee were present, when that entry was made, and that there was not sufficient in the record to amend by. 2ndly. That the note was for seventy dollars, payable in current bank notes, and therefore not within the jurisdiction of a justice of the peace. 3rdly. That the present relator cannot recover for the reason that the note to Colvard was payable to N. S. Jarratt, and did not belong to him, the relator.

The court overruled these objections, and instructed the jury, that, if Colvard had property in his possession, from which the debt could have been collected, if King had used due diligence, the plaintiff was entitled to recover, and that was a question for them.

A verdict and judgment were rendered for the plaintiff and the defendants appealed.

*Gaither*, for the plaintiff.

*J. W. Woodfin* and *Baxter*, for the defendants.

PEARSON, J. The question as to the record of the county court is settled. *State* v. *King*, 5 Ire., 203. It is the duty of every court to make its own record; no other court can indirectly examine into the manner in which it is made. Hence the transcript should not notice the order of amendment, but simply set out the record, as made by the court.

The note in question is for seventy dollars, due 27th October, 1840, payable to N. S. Jarratt, in current *bank notes.* It is insisted, that it is not within the jurisdiction of a single justice, and therefore the defendants are not liable.

Bank notes are not money. They pass as cash, and constitute a part of the circulating medium. We concur with the decision in *Miller and Race*, 1 Burr., 352, that the *bona fide* holder of a bank note is entitled to it, against the former owner, from whom it has been stolen. We also concur with the decision in *Anderson* v. *Hawkins*, 3 Hawks., 568, that, for many purposes, bank notes are to be considered as money; they are to be so considered, whenever the parties consent, by receiving them as such or otherwise, so to treat them. *Pickard* v. *Burks*, 13 East., 20. *Id simile non est idem.* Although a bank note passes as cash, it is not cash; and it is not a legal tender. In this case the parties have done no act indicating that they considered bank notes as money. By stipulating that the payment might be made in bank notes, it is apparent that they were not so considered. If the note had been a promise to pay seven ten dollar bank notes, or to pay seventy dollars worth of bank notes, upon failure the action would be debt for specific articles, or case for

breach of contract, and a single justice would not have jurisdiction. But the note being a promise to pay seventy dollars on a given day, with the privilege of paying in current bank notes, the party must avail himself of the privilege, at the time the note falls due; otherwise it is a note for seventy dollars. It is true the note is not negotiable, because it is not a simple promissory note, within the statute, making such notes negotiable, like inland bills of exchange under the law merchant. But it is still such a promise for money as will support an action of debt before a single justice.

The third objection, that the action should have been upon the relation of Jarratt and not of Dowdle is settled. *Holcombe* v. *Franklin*, 4 Hawks., 274; *State* v. *Lightfoot*, 2 Ire., 310. The contract was made with Dowdle, and he was the proper relator.

PER CURIAM. Judgment affirmed.

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WARNING WALLACE v. WILLIAM REID.

Where there is an appeal by either party from an interlocutory order in relation to a rule founded on an affidavit, the court below should send up the facts, as they find them, and not merely the affidavit, which is only evidence.

Appeal from the Superior Court of Law of WILKES County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

At the fall term, 1848, of Wilkes superior court of law, a rule was taken upon the defendant in this case, to show cause why he should not produce at the trial a certain bill of sale. At the spring term, 1849, the rule coming on to be heard upon argument of counsel, "it was ordered by the court that the rule be discharged," from which interlocutory order the plaintiff appealed. The affidavit, upon which the rule was obtained, is made a part of the case, but there is no statement of facts by the judge below.

*Craige*, for the plaintiff.
*Boyden*, for the defendant.

PEARSON, J. No *facts* are stated, upon which to enable this Court to decide, whether it was erroneous to discharge the rule or not. As we can see no error, the judgment of the court below must be affirmed, as a matter of course.

The affidavit, which is sent as a part of the case, is only *evidence*. The court should have ascertained and stated the facts, so as to present the question of law.

PER CURIAM. Ordered to be certified accordingly.

SILAS McNEELEY v. SAMUEL HART.

Where a person agrees to work on the land of another for a share of the crop, the cropper cannot convey a legal title to his share of the crop to a third person, before an actual division and appropriation.

And the owner of the land, who made the contract, is not estopped to deny the right of such assignee to recover at law.

The cases of the *State* v. *Jones*, 2 Dev. & Bat., 544, and *Fortescue* v. *Satterwhite*, 1 Ire., 566, cited and approved.

Appeal from the Superior Court of Law of Iredell County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This was an action of trover, brought to recover damages for the conversion of a parcel of oats and corn, alleged to be the property of the plaintiff.

To prove property, the plaintiff offered a bill of sale, from one Irwin, of all his interest in the crop of corn and oats, then growing on the land of Samuel Hart, the defendant, executed June 1st, 1844. The said Irwin was introduced by the plaintiff and swore that he had agreed with the defendant to work in the crop with him in 1844, on the defendant's land, and that the defendant agreed to give him one-fifth part of all the corn and oats, that should be raised on the plantation during that year, and the witness had transferred the said interest to the plaintiff by the said bill of sale, at the time therein specified and before any part of the said crop was gathered. The witness testified further, that he kept a hand in the crop during the year, and he, himself, left the country. He swore, further, that the oats were cut, and his share, 70 dozen of sheaves, were stacked to themselves in the field, and afterwards put by the defendant into his, the defendant's, barn; and that the

corn was put into the defendant's crib without a division. The court expressed the opinion that the bill of sale did not vest such a title in the plaintiff, as to enable him to sustain this action; that Irwin's interest in the crop was an executory contract and not any specific property, and that, being a mere *chose in action*, it could not be transferred to the plaintiff.

In submission to this opinion, the plaintiff submitted to a nonsuit and appealed to the Supreme Court.

*H. C. Jones*, for the plaintiff.

A contingent interest in slaves, dependent upon one person's surviving another, may pass by deed; and the bargainee of such an interest having got possession of the slaves, after the contingency's being resolved in favor of his bargainor by his survivorship, is not liable to answer in an action of trover to the wife of the bargainor. *Fortescue* v. *Satterwhite*, 1 Ire., 566.

A deed of land and slaves, upon trust, to apply annually the rents and profit to the use and benefit of a *cestui que trust*, so that they cannot be sold or disposed of or anticipated by him, *is assignable*, and equity will decree an account against the trustee. *Dick* v. *Pitchford*, 1 Dev. & Bat., Eq. 481.

A lessee agrees to pay rent out of the crop while thus resting in *contract or agreement*, before any partition or separation is made, it is levied on and sold, and the Court say this sale would be good, but the inference is left from the language used that, had the separation or partition once been made, the landlord's title would have been perfected. *Deaver* v. *Rice*, D. & B., 431.

Where one crops with another for a share of the crop, and after it is made, the crop is divided, the share of the cropper is liable to be sold by execution, though it was levied before the division, and though it remains in the crib of the owner. *Hare* v. *Pearson*, 4 Ire., 76.

A. assigned all his interest in wheat growing on the land of C., which he had sown on shares. Held, that this interest is assignable, and that an action for taking it away must be brought by the assignees, and not by the assignor to the use of the assignees. *Carter* v. *James*, 9 Johns, 143.

So many cords of wood out of a certain forest to be specified by the grantor; Held, that this interest is assignable, for the interest vested immediately. Rep't 5 Co. 25; Cro. El., 819.

From these cases, and the principles recognized in them, it was argued that an agreement *to have* one-half of a certain growing crop passed an interest in the crop itself; that by the contract, it passed from the cropper to McNeely, and that when the seventy dozen of oats was stacked and set aside as the share of the cropper, the right of the cropper then became perfect and this interest would feed the estoppel, which was created by the contract.

*Osborne* was on the same side.

*Clarke* and *Boyden*, for the defendant.

PEARSON, J. We concur in the opinion of the judge below, for the reasons given by him. Irwin, the cropper, had a mere executory contract, a chose in action, which could not be assigned. *State* v. *Jones*, 2 Dev. & Bat., 544.

It was very ingeniously argued for the plaintiff, that, yielding the question as to the corn, he was entitled to recover for the oats, upon the doctrine of estoppel; for although the bill of sale was executed before the oats were cut, yet as Irwin's share was afterwards allotted and stacked to itself, it thereby became vested in Irwin. This act of appropriation *fed the estoppel*, and thus the right of property vested in the plaintiff.

When one sells property, which does not belong to him,

he and his privies are estopped from alleging, that the vendee did not acquire the title; but the estoppel does not extend to third persons. If the vendor afterwards acquires the title, it *feeds the estoppel*, and vests in the vendee a right of property, not only against the vendor and his privies, but against third persons. Thus the sale has a double operation; *first*, to conclude the parties and privies, until the title is acquired; and then to pass the right of property. *Fortescue* v. *Satterwhite*, 1 Ire., 566; *Christmas* v. *Oliver*, 2 Smith's leading cases, 417, 458. Unfortunately for the plaintiff, there is no estoppel in this case. So the learning about *feeding an estoppel* is not applicable.

Unless the party professes to have such an interest, as could be passed by the conveyance, if he had it, there is no estoppel; for the plain reason, that a matter of law can always be insisted on, as, that a *chose in action* is not assignable, and estoppels are restricted to matters of fact. In *Right* v. *Bucknell*, 2 Barn. and Ald., 278, it is said, "There is no estoppel, when it is apparent, from the face of the deed or the averment of the party, who relies upon it in interest, that, according to the fundamental doctrine of common assurances, the deed could not have sufficed to pass the estate, which he claims to hold under its operation." Lord Coke says, in Co. Lit., 352, b, "one shall not be estopped, where the truth appears by the same instrument, as that the grantor has nothing to grant, or only a possibility," and he might have added "or only a chose in action."

Per Curiam. Judgment affirmed.

PENEL GILREATH v. JOEL R. ALLEN.

In an action of slander, the jury may, if they please, give exemplary damages.

The case of *Duncan* v. *Stallcup*. 1 Dev. & Bat., 440, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1849, his Honor, Judge *Bailey* presiding.

This was an action of slander. It was in proof that there was an action of ejectment pending in the superior court of Henderson county, between the present plaintiff, Gilreath, and one George Allen, the father of the present defendant: that Gilreath, in support of his title in that suit, relied upon a grant from the State of North Carolina for the land in controversy, appended to which grant was a certificate of survey, signed by Thomas D. Clayton, the county surveyor; that the defendant, shortly before the trial of the said suit, to-wit. in March, 1847, said of the plaintiff that he had better make up the suit with his father, before court, for, that the plaintiff had forged the name of the county surveyor, Thomas D. Clayton, to his title. The defendant offered evidence for the purpose of shewing, that, at the time of publishing the words, he was the friend of the plaintiff; that the witness, to whom he spoke the words, was also the intimate friend of the plaintiff; that the communication was confidential, made in good faith, and for the sole purpose, that it should be communicated to the plaintiff, so that the controversy between them might be compromised and friendship restored.

The court charged the jury, that, if they were satisfied that the words had been spoken by the defendant, and that he meant to convey the idea, that the plaintiff had forged the name of Thomas D. Clayton, the county surveyor, to a certificate of survey, which certificate was appended to the grant for the tract of land in controversy, then the plaintiff would be entitled to recover, unless they were satisfied, that the inference of malice was repelled by the confidential communication relied upon by the defendant; that if the communication made by the defendant to the witness was not confidential and in good faith, and for the purpose alleged by him, the plaintiff would be entitled to recover, and the measure of damages was solely for them to determine; that, in making up their estimate, it was proper for them to take into consideration the nature of the offence charged upon the plaintiff, to-wit, the offence of forgery, and the mental suffering arising from such a charge; that if the suffering was great, they were to give him damages by way of compensation; that, in cases of this kind, the question was, how much the plaintiff was entitled to receive, and not how much the defendant could pay; that the damages should always be commensurate with the injury; but that, beyond this, they had no right to add any amount to the damages, which the plaintiff was entitled to receive, for the purpose of punishing the defendant. The jury found a verdict for the plaintiff and assessed his damages to five dollars. The plaintiff obtained a rule for a new trial, upon the ground of misdirection in directing the jury that they had no right, over and above the damages, to which the plaintiff was entitled, to add thereto any amount for punishing the defendant. The rule was discharged and the plaintiff appealed from the judgment of the court.

*Gaither*, *N. W. Woodfin* and *Edney*, for the plaintiff.
*Baxter*, for the defendant.

GILREATH *v.* ALLEN.

PEARSON, J. The plaintiff excepts to the charge of the judge, upon the question of damages. We think he is entitled to a new trial.

It is settled in this state, that, in actions of *tort*, when there are circumstances of aggravation, juries are not restricted, in the measure of damages, to a mere compensation for the injury, actually sustained, but may, *in their discretion*, increase the amount, according to the degree of malice, by which the evidence shews the defendant was actuated, the extent of the injury intended, and not that, which was really inflicted. Accordingly juries are told, in many cases, they may give exemplary damages, that is, such as will make an example of the defendant, or vindictive damages, or smart money, terms which explain themselves. *Duncan* v. *Stallcup*, 1 Dev. & Bat., 440, and the series of cases referred to in Iredell's Digest. There is, in English reports and those of our sister states, an uniform current of decision, which does not leave the question open.

Our attention was called, in the argument, to the remark of Greenleaf in his treatise on Evidence, 2 vol., 242, note 2, sec. 253. The author brings himself to the Conclusion, that the doctrine of exemplary or vindictive damages is not sustained, either by authority or principle. His argument is inconclusive in both particulars. It is certainly so, as to the authorities; and, we think, equally so as to the principle. Injuries, sustained by a personal insult, or an attempt to destroy character, are matters which cannot be regulated by dollars and cents. It is fortunate, that, while juries endeavor to give ample compensation for the injury actually sustained, they are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. Otherwise there would be many injuries without adequate remedy.

If juries are to be restrained, in actions of slander, to damages actually sustained, there can be no reason, why

malice, on the part of the defendant, should constitute the gist of the action. As malice must be proved, it is right that the damages should be in proportion to the degree of malice, and should not be restricted to a mere compensation for the injury actually done, however short it may be of the injury *intended*, and which would have been suffered, had not the plaintiff's character been too high to be reached by the tongue of slander.

In this case, for instance, if the defendant, under the cloak of pretended friendship, attempted to deter the plaintiff from the prosecution of a just claim against his father, by falsely alleging that the plaintiff was guilty of the crime of forgery, can it be right, that he should be protected from exemplary damages, because the plaintiff's high character made the assault harmless. The injury *intended* was the greater. The malice was unmitigated. If such assaults are tolerated, it cannot be told, how soon a high character may be prostrated, and, when it is, damages will not restore it.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

WILLIAM S. NORMENT v. ISAAC S. ALEXANDER.

A bail, against whom a *scire facias* has been issued, cannot avail himself of the defense, that his principal has been arrested on a *ca. sa.*, at the instance of another person, and discharged under the insolvent debtor's law.

The cases of *Crain* v. *Long*, 3 Dev., 571, and *Granbery* v. *Pool*, 3 Dev., 156, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at a Special Term in November, 1846, his Honor, Judge *Pearson*, presiding,

This is a *scire facias* to subject bail. At the return term the defendant pleaded specially, that Marcus S. Alexander, his principal, was arrested on a *ca. sa.* at the instance of ..... and was duly discharged as an insolvent debtor, having previously given the plaintiff in this action proper notice. To this plea there was a demurrer, which, upon argument, was sustained, and the plea overruled. The defendant appealed.

*Boyden* and *Wilson*, for the plaintiff.
*Osborne* and *Alexander*, for the defendant.

NASH, J. We concur in the judgment of his Honor, who tried the cause below. The discharge of the principal, under the insolvent debtor's law, was not a discharge of the debt. Its only effect was to exempt the body of the debtor from an arrest, at the instance of that plaintiff or any creditor duly notified, upon their subsisting debts, leaving his property, subsequently acquired, still liable. *Crain* v. *Long*, 3 Dev., 371. This protection, however, is

personal to the debtor. He may or may not avail himself of it, at his pleasure. In this case, there was nothing to prevent the bail from surrendering the person of his debtor, in discharge of himself. For the defendant might arrest him to acquit himself of his liability, The obligation, into which the defendant entered, when he became the bail of Marcus S. Alexander, was, that, if he, the principal, did not surrender himself, or pay the judgment which might be rendered against him, the bail would pay it, or surrender the body of his principal, if alive. Under the act of 1777, the payment of the judgment, the death of the principal or his surrender can alone be pleaded by the bail in bar of the action. *Granbery* v. *Pool*, 3 Dev., 156. The special plea in this case was no bar, and the demurrer was properly sustained and the plea overruled.

PER CURIAM. Judgment affirmed.

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JOSEPH BROWN v. JAMES RAY.

To make a consideration for a promise, it is not necessary, that the person, making the promise, should receive or expect to receive any benefit.

It is sufficient, if the other party be subjected to any loss or inconvenience.

A trust or confidence reposed, by reason of an undertaking to do an act though the undertaking be entirely voluntary and gratuitous, is a sufficient consideration to support an action on the promise.

Appeal from the Superior Court of Law of YANCEY County, at the Special Term in July, 1849, his Honor, Judge *Caldwell*, presiding.

BROWN *v.* RAY.

This was an action on the case.

The defendant, in March, 1846, had a crib of corn, containing twelve hundred bushels. The sheriff, by virtue of certain executions, levied upon the corn and sold six hundred bushels to different purchasers, in lots of one hundred bushels. The plaintiff bought three lots. After the sale the sheriff said to the purchasers and the defendant, that it was his duty to attend to the measuring and delivery of the corn, but that it was inconvenient for him to do so, and he expected that the defendant would undertake to do it. The defendant agreed to do it, and the corn was left in the crib, with the understanding, that the defendant would measure out and deliver to the respective purchasers the corn they bought, when applied for.

Afterwards, in July, 1846, the plaintiff applied for his corn, and the defendant refused to let him have it; whereupon this action was brought. The court charged, "that, to entitle the plaintiff to recover, he must not only prove a promise made by the defendant to deliver the corn, but he must also prove a consideration to support the promise." The jury found for the defendant, and from the judgment on the verdict the plaintiff appealed.

*N. W. Woodfin*, for the plaintiff.
*J. W. Woodfin*, for the defendant.

PEARSON, J. As an abstract proposition, it is true there must be a consideration to support a promise, but, to make the charge in this case pertinent, it must be understood that the judge assumed that the evidence did not show a consideration. In this, we think there was error, for, in our opinion, the evidence did show a consideration, and the jury should have been so charged. To make a consideration, it is not necessary that the person, making the promise, should receive or expect to receive any benefit. It

is sufficient if the other party be subjected to loss or inconvenience. A trust or confidence reposed, by reason of an undertaking to do an act, is held to be a sufficient consideration to support an action on the promise; as if one voluntarily undertakes to deliver a cask of wine safely at a cellar, although he is to receive no pay for it, an action will lie upon the promise, if he be guilty of negligence, and *a fortiori*, if he retain the wine and refuse to deliver it. *Coggs* v. *Barnard*, 2 Ray., 909, 919. Lord HOLT says: "The owner's trusting him with the goods is a consideration. The taking the trust upon himself is a consideration, though nobody could have compelled him to undertake the trust. As he entered upon it, he must perform it."

So, in this case, nobody could have compelled the defendant to undertake to measure out and deliver the corn, when applied for; but as the trust was reposed in him, and he kept the corn, and undertook to deliver it, he is bound to do so, and is liable to this action for refusing, whether he had used the corn or still had it in his crib.

In the language of Lord HOLT, "the owner trusted him with the goods, and he *entered upon the trust.*"

But for this promise, the plaintiff would have required the sheriff to deliver the corn. This puts the plaintiff to inconvenience, and there is an expressed trust, and an undertaking to do the act. If one undertakes to lead my horse to Statesville, and turns him loose on the road or refuses to deliver him, he is liable, although no compensation was to be given; for he has entered upon the trust, and I have been put to inconvenience by reason of his undertaking.

"The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." *Smith's leading cases*, 1 vol., 169; where the question is fully discussed in the

valuable notes of Mr. Smith, and of the American annotators, Hare and Walker.

PER CURIAM. Judgment below reversed, and a *venire de novo* awarded.

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GEORGE W. BROWN v. HENRY W. CONNER, et al.

Where two defendants are sued upon what purports to be a joint bond, a verdict is found against both and an appeal taken to the superior court, a verdict may be rendered in the latter court against one only; and judgment pronounced accordingly.

Where there is a judgment in the county court against two, and one appeals, they both join in one appeal bond, and there is judgment in the superior court against one and in favor of the other, upon the verdict of the jury, yet the court may render judgment against the latter upon the appeal bond.

The case of *Jones* v. *Ross*, 2 Car. L. Rep., 335, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1847, his Honor, Judge *Pearson*, presiding.

This was an appeal from the county to the superior court of Rowan. In the county court a verdict was rendered in favor of the plaintiff, against both the defendants, who appealed to the superior court, and filed an appeal bond, signed by each of them and their sureties. The plaintiff read in evidence a promissory note, signed Conner and Long, which was admitted to have been signed by R. W. Long, one of the defendants. The plaintiff also proved that Conner and Long, as partners, carried on a public

house of entertainment in the town of Salisbury, called the Mansion House, for several years previous to the year 1842. It was proven that, in 1842, Conner and Long sold the said Mansion House to one Shaver, and dissolved their copartnership from and after the date of their sale, and that the plaintiff had full notice of the dissolution, when he afterwards took from Long the promissory note, sued on, in the name of Connor and Long. The plaintiff offered no evidence, that the articles furnished to Long by him, and for the price of which this note was given, had been furnished before the dissolution of the firm of Conner and Long, and before he had notice thereof. The defendant moved that the plaintiff be nonsuited, because of the variance between the allegation of a note signed by Conner and Long, and the proof of a note signed by Long alone, and not by Conner, or by Long as the agent of Conner. The question was reserved by the court, with leave to move to set aside the verdict and enter a nonsuit. The jury found a verdict against Long and in favor of Conner.

The plaintiff's counsel, thereupon, moved for judgment against the said Long upon the verdict, and against the said Conner and one T. R. Rouche, upon the appeal bond. The defendant's counsel resisted the judgment on the appeal bond, insisting, that, so far as Conner was concerned, he had prosecuted his said appeal with effect.

Afterwards the court was of opinion, that the plaintiff having commenced his suit jointly against Conner and Long, having obtained a joint judgment and verdict against them in the county court, and compelled them to give a joint appeal bond, must be taken to have made his election to proceed against them in a joint action, and could not now elect to proceed against Long alone. Whereupon, on the question of nonsuit reserved, the court was with the defendants, and ordered the verdict to be set

aside and a nonsuit entered. From this judgment the plaintiff appealed.

*H. C. Jones*, *Clarke* and *Boyden*, for the plaintiff.
*Osborne* and *Craige*, for the defendant.

NASH, J. The judgment below is erroneous and must be reversed. The action was in the county court of Rowan, upon a promissory note, purporting to be executed by both the defendants. A verdict was rendered against both, and both appealed to the superior court, and united in the appeal bond. On the trial in that court, the jury found a verdict for the defendant Conner, and against Long, subject to the opinion of the court upon a question of law reserved. The plaintiff moved for judgment against Long upon the verdict, and against Conner and the surety, for the prosecution of the appeal, upon the appeal bond. The latter motion was opposed by Conner's counsel as to him, on the ground that he had prosecuted his appeal with effect. The presiding judge being of opinion with the defendants upon the point reserved, directed the verdict to be set aside and a nonsuit to be entered, thereby declaring that the plaintiff was not entitled to the judgment asked. If he was entitled to either, there was error in the opinion, and there must be a judgment for the plaintiff. The only question upon which our opinion is required is, as to the motion against Conner upon the appeal bond. The action was a joint one upon a joint contract, and in the county court the verdict and judgment were against both defendants. In the superior court the trial was *de novo*, and there the jury severed the defendants by rendering a verdict for Conner and against Long. This is certainly against the rule of the common law, and would be erroneous. 1 Arch. N. P., 57; but it is authorized by the express provision of the act of

1777, Rev. Stat., ch. 31, sec. 88, and was so decided in *Jones* v. *Ross*, 2 Car. L. R., 335. The jury then were authorized to find the verdict they did, and, upon such finding, the act declares, judgment shall and may be rendered accordingly. The defendant, Conner, however, says, that judgment ought not to be rendered against him because he has prosecuted his appeal with effect. Has he so done? We think not. The appeal was a joint one, and the defendants both executed the appeal bond. This bond is in the usual form. After reciting the judgment in the county court, and the appeal, it proceeds, "now, therefore, if the said Richard W. Long and Henry W. Conner shall stand to, abide by, and perform such judgment as the court shall render in the premises, &c." All the obligors are bound to perform the judgment the superior court may render; and the bond was taken in reference to the law, existing at the time of its execution. By the law, the jury were at liberty to find such a verdict as they did, and, upon such finding, the plaintiff was entitled to judgment upon the appeal bond against the defendant Conner, and the surety Rouche. They were the sureties of Long, that he should prosecute his appeal with effect. The defendant Conner, then, could not, under this bond, have prosecuted his appeal with effect, when a verdict was rendered against his co-defendant, Long. The judgment must be reversed, and judgment against Long, upon the verdict, and judgment upon the appeal bond against all the defendants on the appeal bond.

PER CURIAM. Judgment accordingly.

WILLIAM A. WALLACE v. THOMAS DOUGLAS.

In an action under the act of assembly, Rev. Stat., ch, 70, giving a penalty of fifty dollars against the owner of a dog, if he has good reason to believe he was bitten by a mad dog, and neglects or refuses to kill him immediately, it is not necessary to prove that the biting dog was in fact mad: it is sufficient if the owner of the dog had good reason to believe he was mad.

Appeal from the Superior Court of Law of CABARRUS County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This was an action of debt, originally brought by a warrant before a justice of the peace. It was brought to recover the penalty of fifty dollars, which the plaintiff alleged had been forfeited by the defendant, under the 70th chap. Rev. Stat., entitled "An Act concerning Mad Dogs."

The plaintiff introduced much testimony, tending to shew, that a certain dog, belonging to the defendant, had been bitten by a mad dog, and that the defendant, knowing this, neglected and refused to kill his dog immediately. The defendant introduced a number of witnesses for the purpose of shewing, that his dog had never been bitten by a "mad dog," and that, if his dog was bitten, as alleged by the plaintiff, the defendant had no knowledge of it.

The court instructed the jury, that, if they believed that the defendant's dog had been bitten by a "mad dog," and the defendant knew it or had good reason to believe it, and still neglected or refused to kill his dog, then they ought to return a verdict for the plaintiff. But, until they were satisfied that the dog, which bit the defendant's dog,

was a "mad dog," they should not give the plaintiff a verdict.

The jury returned a verdict for the defendant, and on a motion for a new trial, the plaintiff's counsel insisted, that the court ought to have charged the jury, that, if even the dog, which bit the defendant's dog, was not a "mad dog," yet, if the defendant had good reason to think so, he was liable for not killing his dog immediately.

The new trial was refused, and, from the judgment on the verdict, the plaintiff appealed.

*Barringer* and *H. C. Jones*, for the plaintiff.
*Osborne*, for the defendant.

PEARSON, J. This was debt for the penalty of fifty dollars, for refusing to kill a dog, which the defendant had good reason to believe was bitten by a mad dog. It was in evidence, that the defendant knew that his dog had been bitten by a dog, alleged to be a mad dog.

The judge charged the jury, that unless they were satisfied, that the dog, which bit the defendant's dog, was a mad dog, the plaintiff was not entitled to a verdict.

To this part of the charge the plaintiff excepts, and we think there was error.

The statute does not merely require, that a man should kill his dog, if he has good reason to believe him to be mad; but he is required to kill him, "if he has good reason to believe that he has been bitten by a mad dog." The law makers intended to guard, both against positive danger, and the apprehension of danger, such as would be excited in any neighborhood, where it was known that a dog was permitted to live, that was supposed to have been bitten by a mad dog, or that had been bitten by a dog, supposed to be mad. The statute uses the words—"good reason to believe he has been bitten by a mad dog." This is a compound proposition. It embraces two

facts: one, the dog was bitten; the other, the biting dog was mad. We think the words, "good reason to believe," apply to both facts. If a man knows that a dog is mad, and has good reason to believe that this dog has bitten his dog, then he has good reason to believe that his dog has been bitten by a mad dog. So, if a man knows that his dog has been bitten by a dog, which dog he has good reason to believe was mad, then he has good reason to believe that his dog was bitten by a mad dog. How it would be, if both facts, embraced in the proposition, were left uncertain, that is, if the defendant had good reason to believe that his dog was bitten, and had good reason to believe that the dog which bit him was mad, we are not called on in this case to decide, for here the fact of the biting is admitted, and the only question was, whether the defendant's having good reason to believe that the biting dog to be mad was sufficient, or whether it must be proved that he was actually mad. We think one of the two facts being established, and a good reason to believe the other to be true, is sufficient to fall within the words and meaning of the statute.

PER CURIAM. Judgment and *venire de novo.*

DOCTOR C. HOWELL v. EVAN S. HOWELL.

In an action of slander against the defendant, for charging the plaintiff with perjury, in swearing on a certain trial, that "he knew the character of B., and would, from his general character, believe him on oath," it is competent for the plaintiff, in answer to a plea of justification, to prove by witnesses that they also would believe B. on oath from his general character.

The case of the *State* v. *Boswell*, 2 Dev., 209, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of slander. The defendant charged the plaintiff with committing perjury in this: that, upon a certain trial, he swore "that, from the general character of one Brady, he would believe him on oath, and that he was well acquainted with his general character." To sustain the plea of justification, the defendant proved, that, a short time before the trial referred to, the plaintiff said, that Brady's character was so bad, that nobody would believe him; and the defendant called several witnesses, who swore, "that Brady's character was desperately bad, and they would not believe him on oath." The plaintiff called one McWhite, who swore, that he was well acquainted with the general character of Brady; that it was tolerably bad. The plaintiff then asked the witness, if, from the general character of Brady, he would believe him on oath? This question was objected to by the defendant, and the court refused to allow the witness to answer.

To this the plaintiff excepted, and a verdict having been rendered for the defendant, the plaintiff appealed from the judgment thereon.

*Henry* and *J. W. Woodfin*, for the plaintiff.
*N. W. Woodfin* and *Baxter*, for the defendant.

PEARSON, J. We think there was error in rejecting the testimony offered. That the question is proper in the abstract, is settled by the case of *The State* v. *Boswell*, 2 Dev., 209. In fact the perjury charged and which the defendant attempted to prove in justification, was an answer to this very question. After the jury had heard from witnesses, called by the defendant, that, from Brady's general character, as they believed it to be, they would not believe him on oath, it was clearly right that the plaintiff should be allowed to prove, by other witnesses, that from Brady's general character, as they believed it to be, they would believe him on oath. This was the very point, upon which the plea of justification turned.

The defendant says, that his being allowed to ask improper questions, without objection, was no reason why the plaintiff should be allowed to do so, when objection was made. That is true; but it assumes that the question was improper, whereas we think the question was proper and pertinent, and bore upon the very gist of the issue. For, if the plaintiff was able to call one or more witnesses, who would swear, that they were acquainted with the character of Brady, and that, from that general character, they would believe him on oath, it is hard to conceive, how a jury could say, that the plaintiff had sworn knowingly and corruptly false, unless they believed the witnesses, called by him, also swore falsely.

PER CURIAM. Judgment reversed and *venire de novo*.

DOCTOR C. HOWELL and wife v. EVAN S. HOWELL.

In an action of slander, where it appears that the defendant was drunk when he uttered the words, this may go in mitigation of damages, as tending to rebut malice. But where it appears he repeated the charge, both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This was an action of slander for words spoken of the female plaintiff, wife of the other plaintiff. The proof was, that the defendant spoke the words of the female plaintiff, as charged, on many occasions, public and private, sometimes when he was sober, most frequently when he was excited by spirituous liquors. And the court instructed the jury, that his intoxication was not a legal extenuation; and such damages, as they might think otherwise proper to give, ought not to be abated on that account. To this portion of the court's charge the defendant excepted, and, a verdict being found for the plaintiff, the defendant appealed from the judgment thereon.

*J. W. Woodfin* and *Henry*, for the plaintiffs.

*Baxter*, *N. W. Woodfin & Gaither*, for the defendant.

PEARSON, J. Under the circumstances, we think there was no error in the court below. If one, in a passion,

speaks slanderous words and does not repeat them afterwards, his being in a passion is a circumstance to mitigate the damages; because as juries are allowed to give damages, not merely by way of compensation, but for the purpose of making an example, and punishing in proportion to the degree of malice, the fact of being in a passion and not repeating the words afterwards, ought to have a marked bearing upon the amount of the damages. *Gilreath* v. *Allen*, decided at this term. So, if one, being drunk, speaks slanderous words and does not repeat them when sober, his being drunk is a circumstance to mitigate the damages, because it tends to rebut the presumption of "malice," and the words of a drunken man are not usually attended to, and, therefore, are not much calculated to injure. But when the slanderous words are spoken on many occasions, public and private, when the defendant is sober as well as when he is drunk, on some of the occasions, when the words are spoken, instead of tending to rebut the idea of "malice," this tends to shew, that the defendant's heart is boiling over with malice, and cannot, in any point of view, be allowed as a reason for abating the damages, which the jury would otherwise think proper to give.

PER CURIAM. Judgment below affirmed.

J. M. SMITH, Ex'r, &c. v. NAOMI LEEPER.

To repel the statute of limitations, a promise to pay must be proven, either express or implied.

The law will imply a promise, when there is an acknowledgment of a subsisting debt, unless there be something to rebut the implication.

If one pays a debt in part, the law implies a promise to pay the balance, in the absence of any circumstance to negative such a promise.

When a copy of an account was shewn to the defendant, and she said "she had no money, but would call in a few days and settle it," that "she did not intend to cut him out of it"; *Held*, that this was an explicit acknowledgment of a subsisting debt, from which a promise to pay might be implied, if indeed there was not evidence of an express promise.

The case of *Peebles* v. *Mason*, 2 Dev., 367, cited and approved.

Appeal from the Superior Court of Law of GASTON County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

This was an action of assumpsit, commenced before a justice of the peace, in March, 1848, and brought by appeal to Gaston superior court of law. On the trial the plaintiff introduced a witness, and shewed him the account, for the recovery of which this suit was brought. After the witness had examined the account, he stated, that he drew it off from the account book of the testator, before his death, for the purpose of having a settlement with the defendant—that he went with the account to the house of the defendant, and made known to her the object of his visit. She requested the witness to hand the account to her son, who was present, and knew more about the work charged in the account than she did. The witness handed the account to the son, who read over each item in the account in the hearing of the defend-

ant, and neither the son nor the defendant made any objection to any charge in the account, until the son came to a charge for "ironing a wagon." This charge the son said was too much, and some conversation then took place, in relation to the said charge, between the witness and the son of the defendant; during which conversation the defendant remarked to the witness, that she would settle it with the testator of the plaintiff. No item of the said account was read by the son of the defendant, after the charge for ironing the wagon. The son of the defendant did not read out the prices of any of the items, except the one for work upon the wagon, nor was the total amount of the account made known to the defendant. It was in proof that the defendant was an unlettered person, and could not read writing. The last item of the account was in 1841. A few days after the witness had called upon the defendant, as above stated, he called upon her again, with the same account, and requested her to settle it. She stated that she had no money then; that she would come shortly and settle with the plaintiff's testator, as she thought she and the old man could settle better than she and the witness; that she would have called, when she passed the old man's house a few days before, but it was a wet day; that she did not intend to cut him out of it. At this last visit, the witness did not shew the account. These conversations all took place within three years before the commencement of this suit. Upon this evidence, the defendant's counsel insisted there was no evidence to take the case out of the statute of limitations. The presiding judge being of this opinion, the plaintiff submitted to a judgment of nonsuit and appealed.

*Guion*, for the plaintiff.
*Lander*, for the defendant.

PEARSON, J. To repel the statute of limitations, a promise to pay must be proven—either express or implied. The law will always imply a promise, when there is an acknowledgment of a subsisting debt, unless there be something to rebut the implication. If one pays a debt in part, the law implies a promise to pay the balance in the absence of any circumstance to negative such a promise.

This being the general rule, the question is, whether there was evidence to bring this case within its operation. The judge below thought there was not. We have come to a different conclusion.

A copy of the account was shown to the defendant and she was requested to settle it. She said, "she had no money, but would call in a few days and settle it with the old man. She did not intend to cut him out of it." The defendant had a direct reference to the account, which was drawn off and handed to her; and, although, at the first conversation, there was some objection made to the price of one item, we think there was an explicit acknowledgment of a subsisting debt, from which a promise to pay will be implied; if, indeed, there was not evidence of an express promise, having sufficient certainty to support an action, by aid of the maxim, "*id certum est, quod certum reddi potest.*

The direct reference to the *stated account* distinguishes this from *Peebles* v. *Mason*, 2 Dev., 367, and brings it within the rule laid down in that case.

PER CURIAM. Judgment of nonsuit set aside and *venire de novo*.

WILLIAM S. NORMENT v. ANN JOHNSTON.

In an action by a surviving partner for a debt, alleged to be due to the firm the defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was, that the debt, being for the board of this partner, should be paid out of the store, in which the plaintiff and the defendant were copartners.

The cases of *Hogg* v. *Ashe*, 1 Hay., 471: *Cotton* v. *Evans*, 1 Dev. & Bat. Eq., 284, and *Weed* v. *Richardson*, 2 Dev. & Bat., 535, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Special Term in July, 1849, his Honor, Judge *Bailey*, presiding.

This is an action in assumpsit for goods sold and delivered to the defendant, by the firm of C. T. Alexander and Company, of which the plaintiff is the surviving partner. The defendant admitted the plaintiff's account, and the only question on the trial was, whether, upon *non assumpsit*, the plaintiff's demand was not to be considered as paid, or whether the defendant had not a counter-demand, which which was available upon her plea of set-off. To raise the point, the defendant gave evidence, that the other partner, Alexander, was the manager of the business, and boarded with the defendant, and that it was agreed between them, when Alexander began to board with her, that the defendant might and should take goods from the store of the firm for the board; and that, accordingly, the defendant purchased the goods in question and they were charged to her on the books of the firm, and that, while she was making these purchases, Alexander boarded with her until his death, at which time the amount due for the board

exceeded the amount due for the goods. The court directed the jury, that the plaintiff was entitled to recover, without any deduction for Alexander's board. There was a verdict accordingly, for the plaintiff, and from the judgment thereon the defendant appealed.

*L. C. Thompson*, for the plaintiff.
*Bynum* and *Alexander*, for the defendant.

RUFFIN, C. J. Undoubtedly there was nothing to enable the court to hold, that the debt to the plaintiff had been extinguished by a payment. There had been no settlement between Alexander and the defendant, no entry on the books of the firm of a credit to the defendant's account for the amount of the board, nor even an account rendered to Alexander. It is a case merely of accounts on each side, with this material circumstance affecting the present question, that the account, which the defendant owes, she owes to the firm of C. T. Alexander and Company, while that due to her is an account against C. T. Alexander alone. If Alexander were living and the suit had been brought by both of the partners, this demand against one of them clearly could not be set off; much less can it be, when the person, against whom the defendant has the demand, is dead, and the suit is brought by the surviving partner. Indeed, so completely does the debt, contracted to the firm, belong to the surviving partner, that the law treats it as altogether his *in proprio jure*, and admits a debt against him to be a good set off, in an action by him as surviving partner. *Hogg.* v *Ashe*, 1 Hay., 471. But it is argued for the defendant, that, under the agreement with Alexander, she has a right to charge the board to the firm, and that, therefore, it is a good set off. The Court, however, holds the law to be otherwise. The debt is apparently that of Alex-

ander alone, as it was for his personal expenses; and there is no suggestion, that, by the agreement between the partners, the firm was to be liable for his board, nor that the defendant had any reason to think so, save only that Alexander himself engaged with her, that the firm should be liable for the board, provided she would take goods out of the store for it. That was not sufficient to bind the other member of the firm; for it is nothing more nor less than the case of one partner giving the guaranty of the firm for his own debt to a person, who knew it to be his own debt. It has been so often held, that, by itself, that fact is conclusive of the bad faith of the partner thus pledging his partners for his separate debt, and also of the bad faith or gross negligence of the person taking it, which prevents the firm from being bound, that it is only necessary to refer to one or two cases, in which the doctrine has been discussed. *Cotton* v. *Evans*, 1 Dev. & Bat. Eq., 284: *Weed* v. *Richardson*, 2 Dev. & Bat. 535. Therefore the assumption of Alexander to give to the defendant the security of the firm, for a debt he was about contracting with her on his own account, afforded to her, of itself, no just reason to believe, that he had authority from his partner to do so, but on the contrary, was evidence to her, that he was abusing his general authority to use the name of the firm. Beside the mere fact, that Alexander made the agreement with the defendant, there is nothing in the case tending to shew, that Norment gave Alexander a previous authority thus to use the partnership effects and guaranty, or subsequently approved of it. No communication of the agreement seems to have been made to the plaintiff, nor does any entry of a credit of the board, from time to time, appear in the books, nor other matter in the course of the dealings between Alexander and the defendant, or between the partners themselves, from which it can be reasonably inferred, that Norment had notice, that the other

partner was pledging the whole firm, instead of his share of it, for his individual debts. The conclusion is, that the plaintiff is not liable for the debt to the defendant, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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FIDELIS SLUDER v. RICHARD WILSON.

A. charged B. with perjury, in swearing before a single justice to the following affidavit, viz.: "A. has a certain cow in his possession, that belongs to him, the said B.; and the description is red sides, with some spots and unmarked"; *Held*, that the words were not actionable in themselves, as the declaration did not aver, nor the proof shew, that the oath was taken in a proceeding, in which an oath could be judicially administered.

The case of *Brown* v. *Dula*, 3 Murp., 574, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at a Special Term in July, 1849, his Honor, Judge *Caldwell*, presiding.

This was an action of slander, and the case was as follows: The plaintiff made an affidavit before a justice of the peace, "that Richard Wilson had a certain cow in his possession, that belongs to him, the said Sluder; and the description is, red sides, with some spots and unmarked." In speaking of this affidavit, the defendant said of the plaintiff, that he had sworn to a lie; and for speaking these words, this action was brought, and tried on the general issue. On the trial, the plaintiff proved

the speaking of the words and produced the affidavit, in reference to which the words were spoken, and he offered no other evidence. Thereupon the court held, that the action could not be maintained, and gave judgment of nonsuit, from which the plaintiff appealed.

*J. W. Woodfin*, for the plaintiff.
*Baxter*, for the defendant.

RUFFIN, C. J. The words are clearly not actionable in themselves, as they do not import a charge of perjury. To make them amount to such a charge, it is necessary the declaration should state, and the proof shew, a proceeding, in which an oath could be judicially administered, so as to constitute false swearing therein a perjury. *Brown* v. *Dula*, 3 Murp., 574. To bring this act within the rule, the counsel for the plaintiff referred to the act concerning Strays, Rev. Stat., ch. 112, by the 4th section of which, the owner of a beast, which has been taken up and entered as an estray, may, within twelve months after the appraisement, prove his property before the ranger on his own oath, so as to entitle him to recover the beast from the person who took it up. But that does not help the plaintiff, as he gave no evidence, that the cow was an estray or had been taken up as such; so that it did not at all appear, that the affidavit was given for the purpose, or in a proceeding of the kind, provided for in the act. As far as appears, the oath was not at all required nor authorized by the law, but was merely voluntary; and therefore in taking it, the plaintiff could not be guilty of perjury, and, consequently, in saying that the oath was false, the defendant did not impute to the plaintiff the crime of perjury.

PER CURIAM. Judgment affirmed.

ELDRIDGE BURNET v. SAMUEL DAVIDSON.

An action on the case will not lie at the instance of A. against B., for bringing a covinous action against a third person for a penalty, which belongs to any one who would sue for it, which he had incurred under a statute, in which B. intended by his recovery in the action for the penalty, to prevent any other recovery, and that his own recovery should enure to the benefit of such third person.

If A. had brought his action against the person incurring the penalty, and he had pleaded a former recovery, A. might have replied that it was by covin.

If there be any redress for such covinous recovery, it is a public one, to be proceeded against by indictment for a misdemeanor.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Special Term in July, 1849, his Honor, Judge *Caldwell*, presiding.

This was an action on the case, and the declaration contained two counts. Upon the pleadings and evidence the case appears to have been as follows: One Drury Burnet unlawfully set fire to the woods, whereby he became liable to pay fifty dollars, to the use of any person suing for the same, by the Rev. Stat., ch. 16, and the defendant, by concert with Fredric Burnet, the father of Drury, warranted Drury Burnet for the penalty, and got judgment therefor, with the intent of favoring the said Drury and barring an action for the penalty by the plaintiff or any other person. There were the like allegations and evidence, as to another penalty incurred by one

John Hyatt, and a recovery therefor by the defendant with the same intent. The declaration laid the injury to the plaintiff, in his being thereby hindered and barred from recovering those penalties from the said Drury Burnet and John Hyatt. It was not alleged or proved that the plaintiff had instituted any suit for either penalty. Upon not guilty pleaded, the court instructed the jury, that the plaintiff could not recover, and, after a verdict and judgment accordingly, the plaintiff appealed.

*J. W. Woodfin*, for the plaintiff.
*Avery*, for the defendant.

RUFFIN, C. J. The Court is of opinion that the action will not lie. The statute, 4 Hen. 7, ch. 20, gives to one, suing an action popular in good faith, the replication, that a prior recovery pleaded was had by covin, and enacts, that, if the covin be found, the plaintiff with good faith shall have recovery and execution. That is among several beneficial ancient English statutes, which were inadvertently not re-enacted in the revision of 1836, although they were suitable to our condition and had been in force and use here. The principle of the statute, however, is so manifestly just in itself and so necessary to suppress fraud upon the law, as well as that on individuals, that, probably, it is proper to regard this statute, like that of 13th of Elizabeth in favor of creditors, as but declaratory of the common law; for it would manifestly render useless all penal statutes, if convinous recoveries by friends, not enforced nor intended to be enforced, were allowed to protect the offender from an action brought in good faith. If that be correct, the plaintiff cannot have this action; because it supposes the injury to the plaintiff to consist of being barred of actions for the penalties, when, upon the decla-

ration, it appears he was not barred. But that point need not now be determined, for, admitting the recoveries to be a bar, as supposed, yet the plaintiff has sustained no extraordinary or peculiar damage, but such only as is common to any one else. In such a case, the redress, if there be any, must be to the public, for the common wrong, and not to individuals. Covinous recoveries partake in some degree of the nature of compounding action on penal statutes, which Mr. Blackstone classes among the misdemeanors against public justice, as contributing to make the laws odious to the people. 4 Com., 136. Hence the statute 18th Elizabeth, c. 5, which, by the way, is also not found in our statute book, inflicted the severe punishment of the pillory, besides a fine, for that offence. As the act of the defendant is of that nature, and every one can say, with equal truth, that he is, by means of the defendant, barred of recoveries for the penalties in question, the law cannot allow an action to any person or persons in particular, since, for the same reason, the defendant would be held liable for the same sum in innumerable suits, which would be most unreasonable and intolerable. *Williams'* case 5 Rep., 73.

PER CURIAM. Judgment affirmed.

WESTLEY CURTIS v. JOHN SMART.

An action for a joint battery and false imprisonment against four persons was tried. By agreement of counsel, the verdict, if agreed upon, was to be rendered during the adjournment of the court. The jury returned a verdict finding all the defendants guilty and assessing separate damages against each, and the clerk entered the verdict accordingly. When the court met after the adjournment, the jury, being informed they had done wrong, in assessing separate damages, were permitted to amend their verdict by finding damages against all the defendants jointly; *Held*, that the judge below acted properly in permitting the amendment of the verdict.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This action was against four for a joint battery and false imprisonment; and, after the jury retired, it was agreed by the counsel on each side that the court might be adjourned till the next day, and that, when the jury should be agreed, the clerk might enter the verdict in the absence of the judge and the counsel. The jury accordingly informed the clerk that they found for the plaintiff and assessed his damages to thirty-five dollars against each of the defendants, and the clerk so entered it as their verdict, and the jury then separated. The next morning, the entry was read to the court and jury, and the presiding judge informed the jury that it was not usual to assess the damages severally, and requested them to assess against the defendants, jointly, such damages as they thought the plaintiff entitled to recover in the whole. The jury, thereupon, consulted together, and assessed the damages against all the defendants to one hundred and fifty dollars, and the verdict was

amended accordingly. Judgment being rendered upon this verdict, the defendants appealed.

*N. W. Woodfin* and *Gaither*, for the plaintiff.
*Avery* and *Bynum*, for the defendants.

RUFFIN, C. J. The Court is of opinion that his Honor did perfectly right. The verdict, as first rendered, would have authorized a judgment *de melioribus damnis ;* and one against each of the defendants for the several sums against them would have been enormous. *Sabin* v. *Long*, 1 Wilson's Rep., 30 ; *Hill* v. *Goodchild*, Bur., 2791. If the judge had been in court when the jury first came in, he would no doubt have informed them, as he ought, of those points of law, so as to let them know, that, for a joint trespass, it was the duty of the jury to assess damages jointly against all the trespassers to the full amount sustained by the plaintiff. He did no more as the case actually was ; and there was no improper alteration of the verdict. The truth is, there was, technically, no verdict, until the jury rendered it in court on the morning after the trial. It was not a privy verdict, because it was not rendered to the judge out of court. But, even if it had been, the jury had the right to reconsider and affirm or disaffirm it in open court. 3 Comm., 377. Much more could they vary from an imperfect verdict like this ; and especially, to make it formally what it is evident it was intended substantially to be, and legally ought to have been. But, no doubt, the proper view of the matter is, to regard this as a public verdict, not because it was really so, but because the parties agreed that it should be entered after the adjournment of the court, as if it had been rendered and entered before the court adjourned—*nunc pro tunc*. Then, the defendants say, the clerk was made the substitute of the judge, and, consequently, the

verdict entered before the clerk cannot be altered. But that is not to be so considered at all. The clerk was not to be, and could not be, the substitute of the judge; but he was merely clerk, with the duty of entering the verdict truly, as expressed by the jury. Therefore the fair meaning to be put on the agreement of the parties is, that the verdict, if given while the court was adjourned, should finally, if it were not so done at first, be so expressed as to make it a valid verdict and conformable to the substance and legal effect intended by the jury. We should, therefore, have approved, without hesitation, of the amendment in this verdict, if it had been made by the presiding judge, without consulting the jury. But the change was made by the jurors themselves, under the advice and leave of the judge, in furtherance of justice, and, as we conceive, there can be no solid objection to it.

PER CURIAM. Judgment affirmed.

JEREMIAH KING v. DAVID SHUFORD, et al.

Notwithstanding the act of 1844, ch. 13, relating to jury trials in the counties of Henderson and several others named in the act, a person cannot maintain an action on the case for the overflowing of his land by the erection of a dam for a public grist-mill in the county of Henderson, without having first proceeded by petition either in the county or superior court of Henderson, according to the provisions of the general law passed in 1836.

The cases of *Mumford* v. *Terry*, 2 Law Rep., 425, and *Gillett* v. *Jones*, 1 Dev. & Bat., 339, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Special Term in June, 1849, his Honor, Judge *Caldwell*, presiding.

This was an action on the case for overflowing the plaintiff's land by the erection by the defendant of a dam for a public grist-mill in Henderson county. It was brought in the superior court of that county; and the question was, whether it would lie, inasmuch as the plaintiff had not first filed a petition to have the annual damage assessed. The presiding judge held that it would not, and gave judgment for the defendant, and the plaintiff appealed.

*Baxter*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

RUFFIN, C. J. The decision of the superior court is sustained by the general law, Rev. Stat., ch. 74, sec. 14, and the case of *Mumford* v. *Terry*, 2 Law Rep., 425. But it is contended for the plaintiff, that the law was altered by the act of 1844, ch. 12, and that now there is no rem-

edy for a nuisance of this kind in the county of Henderson, but by the common law action. The act in question enacts, "that it shall not be lawful for the county courts of Buncombe, Henderson and several adjoining counties named to try any causes, where a jury may be necessary, nor shall they summon any jury to attend them, and that all suits in the said counties, whether civil or criminal, shall originate in the superior courts, and all appeals from justices of the peace in civil cases shall be returnable to the superior court." Upon these provisions, taken in connection with that of the Revised Statutes, which requires the remedy by petition to originate in the county court, and that a jury shall go on the premises to assess the damages, and authorizes the cognizance of it in the superior court, upon appeal only, and directs a trial there at bar, it is argued that neither the county nor superior court can entertain a suit by petition, and, therefore, it is inferred, as there must be a remedy for an admitted injury, that the one by action on the case lies. But the Court cannot concur in the reasoning nor in the conclusion. The act of 1809 was intended, and has even been construed, as a highly beneficial law, entitled to a liberal interpretation. It was thus characterized in *Gillet* v. *Jones*, 1 Dev. & Bat., 339, as well as in *Mumford* v. *Terry*, and subsequent cases. If, therefore, the jurisdiction of the county courts over this subject were expressly abrogated, it would not follow, that the beneficial provisions, as to the method of ascertaining and making the compensation due for the injury, occasioned to another by the erection of a mill, were to be wholly lost to the country. It would rather be the duty of the judges to consider, that the jurisdiction of the county courts was transferred to the superior courts, so as to vest in the latter, by the union of the powers of both courts, the whole jurisdiction of the subject, to be exercised, as

far as possible, in the manner prescribed by the statute, and to answer the ends within its provisions. But that is the more emphatically true, when it is observed, that the act in question is not a general law, but has only a local operation, and respects the jurisdiction of the courts of six counties only. For it would be wholly inadmissible to suppose, that the legislature meant by the act, not merely to say in what courts actions should be brought in those counties, but, also, that the rule of law, as to the rights and the remedies of the citizens, respecting so important a matter, should be different there from that in all the rest of the state. It is clear, therefore to our apprehension, that the citizens of those counties are not thrown back to the common law in this respect; but that either the county or superior court may, and therefore must, entertain a suit by petition, as prescribed by the act of 1836.

PER CURIAM. Judgment affirmed.

DANIEL PACE v. MEREDITH FREEMAN.

Possession alone will maintain an action on the case at common law for overflowing one's land, and therefore is sufficient to support a petition, under our act of assembly, in relation to mills.

The act of assembly of 1844, which excludes trial by jury in the county courts of Henderson and other counties named, refers to trials by a jury in court. A petition, therefore, to recover damages for injury to one's land from the erection of a mill-dam, must still be brought in the county courts of those counties.

The cases of *Yeargain* v. *Johnston*, Taylor's Rep., 80, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This suit was commenced by petition, in March, 1847, in the county court of Henderson, to recover damages for overflowing the plaintiff's land, by the erection of a grist-mill. The petition states, that the plaintiff was seized in fee-simple in possession of a tract of land, containing five hundred acres, situate on Green River, and that about thirty acres thereof was river bottom; and that the defendant built a dam across the river, and erected a grist-mill below the plaintiff's land, whereby he backed and ponded the water on the greater part of the thirty acres of bottom, so as to render it unproductive and unfit for cultivation; and it prayed that the damages, sustained by the plaintiff, should be enquired of and assessed by a jury on the premises, and judgment rendered against the defendant therefor, according to the form of the statute.

The defendant by an answer insisted, that, by an act of the general assembly passed in the year 1844, the county court had no jurisdiction of the suit, and for that reason prayed that the petition might be dismissed, as if the matter were specially pleaded. He also denied, that, by the erection of his mill on Green river, he had injured the plaintiff's land, and alleged that the plaintiff felled much timber into the river above the mill, which had been floated down in rafts and lodged in large masses, so as to throw the water of the river out of the channel on some parts of the land contiguous; and that, therefore, the plaintiff's loss arose from his own fault and not from any act of the defendant.

Upon the hearing the court sustained the prayer of the petition, and awarded a suit of *ad quod damnum* to be issued, and a jury was empanelled on the premises, who found a verdict, on which there was a judgment in the county court; and the defendant appealed. Upon the appeal coming on, and before the jury was charged, the defendant moved the court to dismiss the petition, because the remedy by petition had been taken away by the act of 1844, and the action on the case at common law was the only remedy; and because, if the petition would lie at all, the county court had no jurisdiction, but it should have been filed in the superior court. But the court overruled the motion, and had a jury empanelled to assess the damages sustained by the plaintiff. Upon the trial, the defendant objected, that the plaintiff was not seized in fee nor entitled to any estate in the land; and, for that reason, he moved the court to instruct the jury, that the plaintiff was not entitled to any damages; and the presiding judge gave his opinion, that the plaintiff could not recover without shewing an estate in the land. The plaintiff then gave in evidence a deed of bargain and sale for the premises, made to himself by another person, purporting to be in fee, and furthermore that

he entered into the land and had been in possession for five years preceding the petition, claiming under the said deed. It was then agreed that the jury should assess such damages to the plaintiff, as they might think were proper, subject to the opinion of the court, whether the plaintiff had shewn such an estate or interest in the land as entitled him to any damages. The jury accordingly gave a verdict for the plaintiff for five years' damages; but the court, being of opinion with the defendant on the point reserved, set the verdict aside and dismissed the petition. From this judgment the plaintiff appealed.

*N. W. Woodfin*, for the plaintiff.

*Baxter*, for the defendant.

RUFFIN, C. J. If the question of title were at issue upon this record, it would yet have been erroneous to give judgment against the plaintiff; for possession alone will maintain the action at common law, and, by consequence, this by petition, which is a substitute for the former. *Yeargain* v. *Johnston*, Tay. Rep., 80. Indeed, it is said to be better not to state a seizin in fee, nor to set forth the plaintiff's title further than that he was possessed; because, if an insufficient title be stated it will be fatal, or if a good one be stated and put in issue, it must be proved as stated. 2 Saun., 113, n. 1; 206, n. 22; and 207, n. 24. It may be true that on the statute remedy in which the damages are assessed prospectively, as well as retrospectively, it may be necessary to set forth a title, which will authorize the damages in future, if such be claimed. But in reference to those sustained up to the period of the trial, the allegation and proof of the plaintiff's possession alone are sufficient, since, as possessor merely, he has suffered them up to that time. Here, the possession of the plaintiff was alleged and proved, for more than a year before the suit brought and up to the trial. Therefore, it was undoubt-

edly wrong to dismiss the petition ; for, if it would not lie for those damages, one, who had a term for less than five years, would have no redress for an injury of this kind. Indeed, it deserves consideration, whether the question of title can be entertained at all before the jury ; for, as the proceeding is summary, it seems rather to have been intended, and also to be most appropriate, that the interest of the plaintiff should be passed on by the court on the hearing of the petition, so as to reduce the province of the jury to the enquiry into the fact of injury and of the amout of damages, as specified in the writ and their oath. But it is not material to enter into that matter now, as the title was really not in issue in this suit. An estate in fee-simple in possession is directly alleged in the petition, and the answer does not dispute, but, by a plain implication, admits it, saying that the injury to the plaintiff's land was the consequence of the plaintiff's own act, in causing the river to overflow its banks and throw the water on his land, and was not caused by the defendant's ponding his water. On this part of the case, therefore, the Court is of opinion with the plaintiff.

Upon the other point, respecting the nature of the action and the jurisdiction of the county court, this Court concurs with his Honor. We have already had occasion, at the present term, in the case of *King* v. *Shuford*, (see ante, p. 100,) to declare our opinion that by the act of 1844, ch. 12, the remedy by petition is not done away with in Henderson and the other counties mentioned in it ; and therefore that the action on the case will not lie, except as provided for in the act of 1809. That reduces the inquiry now to the point, whether the petition is to be brought in the county or the superior court. As to that, the language of the act of 1844 is not as clear as it might be, and, perhaps, upon that, by itself, we might consider it doubtful, whether the broad terms, "all suits

whether civil or criminal, shall originate in the superior courts," would not vest the jurisdiction of cases of this character in those courts. It is to be remarked, however, that it is a general principle of construction, that a statute is never to oust a jurisdiction, but upon express words or a plain implication; and that this must be especially true, when, by the change of the jurisdiction, the citizen loses an advantage he would otherwise have. Here the words of the section, in restraint of the powers of the county courts, are, that they shall not summon a jury to attend them, nor try a cause where a jury may be necessary. The obvious sense of the provision is, that there is to be no jury in the county court, and, that, for that reason, that court is not to entertain jurisdiction of a suit, in the trial of which, in court, a jury would be requisite. That reason does not extend to the present case, more than it does to one, in which the application is for the appointment of four freeholders to lay off, view and value the two acres of land, for the purpose of building a mill, under the act of 1777. It is clear, that latter duty is yet imposed on the county court; and the other case stands on the same reason. For, although there must be a jury in it, they are not jurors in court, but an inquest on view, and it is as well to award the *venire* for such a jury from the one court as the other, except so far as the greater frequency of the terms of the one may render the proceeding in it more speedy and less expensive. It is precisely like the case of assigning and laying off dower, which jurisdiction it is highly convenient those very useful and respectable courts should exercise, and, as we are informed, have continued to exercise in the counties for which the act of 1844, and others like it, have been passed. Another similar instance is an inquisition of lunacy, which is expressly directed to be issued from the county court, as a foundation for the appointment of a guardian by that court; a function which

the superior court has only by appeal. Proceedings of any of those kinds are not spoken of, as trials by jury in court, but are inquests out of court, though certainly subject to the control of the court, so far as to confer the authority to set them aside for good cause, as would be done with the report of commissioners to make partition and the like. Besides, there is a further consideration possessing much weight in determining this point. The act gives an inquisition on the premises, for the obvious reason, that it will be more satisafctory to the jury to judge for themselves than upon evidence; that such a decision will be more respected by and satisfactory to the parties than one made from hearing witnesses, and, at all events, that it will be less expensive than in summoning witnesses to court and attending there from day to day for an indefinite period. Of all these benefits the parties are to be deprived, if the original jurisdiction were established in the superior courts exclusively; or, else, the verdict of the jury of view, taken by writ from that court, is to be set aside at the will of either party and of right, so as to have a trial at bar, without giving the security, which, upon an appeal, would be required. For we suppose it clear, that, in those counties, parties to a controversy of this kind are not to lose the benefit of an opinion of a judge and his instructions to a jury on their case; and, therefore, that at all events each one must have some means of bringing the case to a trial at bar; if so, it must be by appeal from the county court, by giving security for the performance of the final judgment, as directed by the act of 1809, or, if the county court has no jurisdiction, by demanding the verdict of the jury on the premises to be set aside, without assigning any cause and as a matter of right. Between the alternatives of having a jury of view, with a right of appeal to a trial at bar in the superior court on giving security, as in other cases; or, on the other hand, of hav-

ing no jury of view, or, if there were one, of having the verdict arbitrarily avoided by the mere will of the party, without paying its expense or securing the ultimate recovery or costs, it is not difficult to determine. It cannot be supposed, that the legislature were not aware of the conveniences and inconveniences of those several alternatives; and that, if the material changes in the proceedings, that have been pointed out, had been intended, some provision would have been made for them. These considerations, added to those already drawn from the language of the act of 1844, lead us to the conclusion, that "all suits," in the section, which confers jurisdiction on the superior courts, are to be construed in reference to the previous section and mean "all such suits," as, by that section, the county courts had been ousted of the jurisdiction of, namely, those in which there could be no "trial" in the court, without a jury. Therefore, upon the whole, the opinion of the court is, that the suit was rightly brought; and that the judgment of the superior court must be reversed, and judgment rendered for the plaintiff according to the verdict.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

JOHN DOE ON DEMISE OF MATTHEW WALLACE v. JOHN T. MAXWELL.

The doctrine of estoppel does not apply to the sovereign nor to the assignee of the sovereign.

From an actual, continuous possession of land up to known boundaries for thirty years, the law presumes a grant to the party in possession and a title in those claiming under him, and the jury should so find.

The occupation must be such as is consistent with the usages of agriculture, such as cultivating the land, clearing new, and turning out, old fields and cutting timber promiscuously.

The cases of *Taylor* v. *Shepard*, 4 Haw., 132; *Candler* v. *Lunsford*, 4 Dev. & Bat., 407, and *Fitzgerald* v. *Norman*, No. Ca. T. R., 131, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

The plaintiff claimed the land in dispute under a grant from the state, issued to him in May, 1842. The defendant proved, that one Black cultivated a part of the land in controversy, thirty or thirty-five years ago, and claimed the whole up to the boundary lines of the plaintiff's grant for forty years, and cut timber from different parts of the premises during that time, and that the boundaries were well known in the neighborhood, and Black's claim, under which the defendant claimed, was public and notorious. The defendant married a daughter of Black, and has been living upon the land, since his death, and is so still in possession, claiming up to the same boundaries. One of the cleared fields has been turned out, and is now an old field, and had not been cultivated

fourteen or fifteen years before the bringing of this action. The defendant offered in evidence a grant issued by the royal government to one Selwyn. The reading of it was objected to by the plaintiff, upon the ground, that the defendant claimed title under the state, and could not prove the title in any one else. To sustain his objection, he gave in evidence a grant of this same land, issued by the state to the defendant, in June, 1842. The court overruled the objection, and a witness proved, that the grant to Selwyn covered the land described in the plaintiff's declaration. The plaintiff contended first, that the defendant had not sufficiently proved his claim under Black; 2ndly, that cutting timber on the land was not a sufficient possession to warrant the presumption of a grant; and 3rdly, that a part of the land had been abandoned by turning out an old field.

His Honor instructed the jury, that, if they believed that the defendant and Black had successively claimed the land up to the known visible boundaries, and had an actual adverse and continuous possession of the same, such as was consistent with the usages of agriculture, for thirty years, they ought to presume a grant and all the necessary mesne conveyances for the same to the defendant: That such possession must be by actual occupation and continuous, and accompanied by the exercise of all such acts of ownership over the same, as persons usually exercise on their own lands; that, among these acts of ownership, were the clearing and cultivating of new fields and turning out old ones, when worn out, and cutting timber promiscuously; that if the defendant, and those under whom he claimed, had such an adverse possession for twenty-five years, and thence up to thirty years, to known and visible boundaries, they, the jury, would be at liberty to presume a grant to have issued; that, if they believed the Selwyn grant from George the 3rd, covered the premises, then the

plaintiff would not be entitled to recover. There was a verdict for the defendant.

Rule for a new trial, for admission of improper testimony and for error in the charge. Rule discharged and appeal.

*Alexander*, *Wilson* and *Boyden*, for the plaintiff.
*Osborne*, for the defendant.

NASH, J. We concur with his Honor, the presiding judge, who tried the case below, both in admitting the testimony objected to, and in his charge. The evidence objected to was the grant by George 3rd to Selwyn; and upon the ground that the state had granted the same land to the defendant in June, 1842. The sovereign can not be estopped. It acts by agents and is a trustee for the people, and for their benefit the truth may always be shown. *Taylor* v. *Shuford*, 4 Haw., 132; *Candler* v. *Lunsford*, 4 Dev. & Bat., 407, is to the same effect, with the additional principle, that when the sovereign is not bound his assignee is not. These authorities only sustained his Honor in this part of the case. The charge delivered by the court divides itself into two branches, and in each his Honor was correct. The first was, that as the defendant and Black had for thirty years had a continuous adverse possession of the land in question, up to known and visible boundaries, they *ought* to presume a grant, that is, that the law presumed a grant and they ought so to find. The case of *Fitzgerald* v. *Norman*, N. C. T. R., 131, which is the leading case in this state, states, that such a possession for thirty-five years raises the legal presumption of a grant, and that of *Candler* v. *Lunsford* cuts down the time to thirty years. Less time than thirty years has never been permitted in this state to raise this presumption of law, nor are we disposed to admit it,

under a shorter period. The case states, that the boundaries of the tract were well known and visible; that Black had opened and cleared up different portions of the land and enclosed them, and had been in the actual adverse possession for thirty years and upwards, and had continually claimed up to the boundaries, by using the woodland as his own, and that the defendant, who had married his daughter, had, since his death, continued the possession. Under these circumstances, if the jury believed them, they were instructed to find that the law presumed a grant. In the second place, his Honor instructed the jury, that if they should not be satisfied, that the possession of the defendant and Black had continued for thirty years, but only for twenty-five, yet if it were a continued adverse actual possession for that length of time, accompanied by a continued claim of ownership, up to the known and visible boundaries for five years more, they were at liberty to find, as a matter of fact, that a grant had been issued, if from the circumstances they were satisfied such was the fact. We see no error in this portion of his charge. It is in strict accordance with the decision of this Court in this case when before us heretofore. 7th Ir., 135. This Court on that occasion said, that the actual possessson of Black, for twenty-five or thirty years, accompanied with a claim and the exercise of acts of ownership and of dominion up to a well-defined boundary, was evidence that ought to have been left to the jury to presume a grant of the land to Black or those under whom he claimed. This was done by his Honor in this case. His Honor was careful to tell the jury what he meant as to the acts of ownership which were to accompany the actual possession. They were such acts as persons usually exercise over their own land—such as clearing and cultivating new fields, and turning out old ones, when worn out, and cutting timber

promiscuously. These directions were an answer to the second and third objections made by the plaintiff.

PER CURIAM. Judgment affirmed.

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WILLIE GAITHER v. EUSEBIUS HETRICK.

Where A. had contracted to sell certain land to B. and afterwards conveyed it to a trustee to be sold for the payment of his debts, and, on the day of sale, upon A's. forbidding the sale, it was agreed by parol between A., B. and the creditors secured by the deed of trust, that the land should be sold and the money arising from the sale should be subject, in the hands of the trustee, to the claim of the rightful owner; *Held*, that the trustee, although he had received the money, was not liable to an action of assumpsit by A., A. having at most but an equitable right.

Appeal from the Superior Court of Law of CALDWELL County, at the Fall Term, 1849, his Honor, Judge *Manly*, presiding.

This was an action of assumpsit for money had and received, and non-assumpsit pleaded. The case was, that Philip H. Benick was seized in fee of a tract of land, and, in October, 1843, entered into articles with the plaintiff for the sale of it, and covenanted to convey it to the plaintiff on or before the 1st of March, 1844. On the 5th day of January, 1845, Benick conveyed the same, with other lands and things, to the defendant, in trust to sell for the purpose of paying sundry debts; and, shortly thereafter, the defendant offered the land at public sale, when the plaintiff, being present, forbade the sale. It was then agreed,

verbally, between the plaintiff and defendant, and the creditors secured in the deed, that the plaintiff should withdraw his objection, and that the land should be sold under the deed, and the money be subject, in the hands of the trustee, "to the claim of the rightful owner." The land was accordingly sold and conveyed by the trustee, and he received the purchase money and refused to pay it to the plaintiff, who then brought this action. The presiding judge was of opinion that the plaintiff could not recover, and ordered a nonsuit, from which the plaintiff appealed.

*Gaither*, for the plaintiff.
*Guion*, for the defendant.

RUFFIN, C. J. It is quite clear, for several reasons, that the action will not lie. The agreement between Benick and the plaintiff is merely executory, and vests no title to the land in the plaintiff, nor any interest, which, for the purpose of this action, can be recognized at law. Therefore, there is no consideration, on which a promise can be implied, to pay the price of the land to the plaintiff, as being his money or the produce of his land. But if an equitable interest in the land can be recognized in the plaintiff, still he cannot recover, because, *first*, the contract, being for an interest in the land, was not in writing and is absolutely void at law; and, secondly, because the plaintiff has not cancelled Benick's bond to him, nor released nor assigned to the trustee or to the purchaser his equitable title to the land. The plaintiff has yet all the right in the land that he ever had. The price paid by the purchaser was for the legal title, conveyed to him by the defendant, and it is evident, that under the agreement at the sale, the defendant holds the money as trustee, either for the plaintiff, or for the creditors secured in the deed, as the one or the other shall be found to be entitled to it, as a part of the trust fund.

That question can be determined only in a court of equity, and therefore the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

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DEN ON DEMISE OF JOSEPH KING v. WILLIAM BRITTAIN.

Generally speaking, in an action of ejectment, one, who comes in as landlord, is to be taken as admitting the possession of all the land, described in the declaration, to have been in the tenant and to be in himself.

But when a declaration embraced several tracts, held separately by different tenants, the admission of possession by the landlord should be referred only to the tract occupied by the tenant, on whom the process was served.

The cases of *McDowell* v. *Love*, 8 Ired., 502, and *Carson* v. *Burnett*, 1 Dev. & Bat., 546, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

The lessor of the plaintiff derived title to the premises, claimed in this ejectment, under a justice's judgment against Young Gallion. The execution was against the property of Gallion and Thomas B. Cook, and the levy was made June 25th, 1843, and returned to the county court. An order of sale was made at September term following, a *venditioni exponas* was issued and under it the sale was made to the lessor of the plaintiff. In order to shew title in Gallion, the plaintiff gave evidence, that the defendant claimed under him by virtue of a deed of bargain and sale, executed on the 2nd of January, 1843,

by Gallion to Thomas B. Cooke, who conveyed to the defendant. And, in order to shew the defendant to be in possession of the premises, mentioned in the declaration, the plaintiff shewed, that the declaration was served on one John Ballard, as the tenant in possession, and that Brittain was admitted defendant upon his affidavit, that Ballard was his tenant. The affidavit purports to be made, and is entitled in this cause, and also in another action of ejectment upon the demise of the same lessor, King against the said Thomas B. Cook; and upon it Brittain was admitted to defend in each of those cases, and entered into the common rule and pleaded not guilty. The declaration in each of the cases was for the whole of the land purchased by the lessor of the plaintiff, and described it by metes and bounds as one tract. The defendant then gave evidence, that Cook was in fact in possession separately of twenty-five acres only, being part of the land covered by the deed of the lessor of the plaintiff and described in the declaration; and that, in the action which was originally brought against Cook, the plaintiff had recovered that parcel and been put in possession thereof. And the defendant gave evidence further, that Ballard was in possession of the residue of the tract, namely, two hundred acres, purchased by the lessor of the plaintiff, and no more; and that he had never been in possession of any part of the parcel or tract of twenty-five acres, so claimed in the suit against Cook and therein recovered. Upon this evidence the defendant insisted, that the plaintiff could not recover: *First*, because the plaintiff had not impeached his title under the deed from Gallion, which was executed nearly six months before the levy of the execution against Gallion's property, under which the plaintiff claims, and, under it, the defendant had the title to the two hundred acres, of which Ballard was the tenant. *Secondly*, that the order of sale was void, because the record did not shew a notice to Gallion

of the levy and return; and, *thirdly*, because of the variance between the judgment and execution—the former being against Gallion alone, and the latter against the property of Gallion and Cook. It was agreed, that these points should be reserved and a verdict entered for the plaintiff, subject to the opinion of the court thereon; and that, if it should be against the plaintiff, the verdict should be set aside and a non-suit entered.

The court, being of opinion that the plaintiff should be nonsuited, gave judgment accordingly, and the plaintiff appealed.

*Baxter*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

RUFFIN, C. J. As the defendant's title to the land in actual possession of Ballard, being all that was claimed by that person, is clear, he was entitled to the nonsuit, unless he or the defendant Brittain is to be deemed to be also in the possession of the parcel of twenty-five acres, for the purposes of this action. It would be a thing to be regretted, if it were so; as it is directly contrary both to the fact and to the understanding of the parties. It depends upon the construction of the affidavit of the defendant, Brittain, and of the rules made on it. Generally speaking, one, who comes in as landlord, is to be taken as admitting the possession of all the land, described in the declaration, to have been in the tenant and to be in himself. *McDowell* v. *Love*, 8 Ired., 502. But not always; for in *Carson* v. *Burnett*, 1 Dev. & Bat., 546, it was held, that, although the declaration covered both places, yet the plaintiff could not give evidence of a trespass by Mills, the landlord, at a place, which appeared by the plaintiff's own evidence not to have been in the possession of the tenant, Burnett; and the reason assigned is, that it would be a surprise on the landlord, if he were called on

to defend there for portions of the land, not in Burnett's possession, and, in respect of which, no recovery could have been, against Burnett, by himself. So here, we think it would be manifestly a surprise on Brittain, if a recovery could be effected against him, in respect of either the land or the costs, upon a presumption, that he was defending, in this action, his possession to the small parcel of twenty-five acres, which never were in the possession of the tenant, Ballard, against whom this suit was brought, but were in the possession of Cook, against whom another suit was brought, in which Brittain defended for that part unsuccessfully, and upon a recovery made therein, the lessor is actually in possession thereof. But it is argued, that Brittain is to be considered as defending for all the land described in the declaration, and not merely for the part held by Ballard, because the rule does not designate the parcel, for which he defends, as that in Ballard's possession, but is general. But the truth is, that the rule was not drawn out at length in either of the cases, and is, merely, according to our very loose practice, that "upon the affidavit of William Brittain, he is admitted party defendant." The rules are, therefore, to be referred to the affidavit, as explanatory of their true meaning. From that it is clear, that the landlord meant to defend in each action for the several parcels, as such, which the tenants, defendants in the two actions, respectively had in possession; for it cannot be supposed, that either party intended the absuridty, that each of the tenants had the several possession of the whole of the land, at one and the same time. As the affidavit was made in the two cases, and, in each of them, the plaintiff sought to recover upon several, and not joint ousters by Cook and Ballard, it is absolutely certain, that those persons and Brittain must have understood, that the recovery was sought in each case for the part of the several possession of each. Consequently, in the case, which was

brought against Cook, and which came on first to be tried, there was no thought of recovering therein the land held by Ballard, although there was just the same ground for doing so, that there is, in this case, to recover for the parcel that was held by Cook; but the recovery was in respect of the latter only. It is plainly against justice, that there should not be a second recovery for the same parcel against the defendant, Brittain, when no recovery could have been had therefor against Ballard, whose possession Brittain undertook to defend. It is an attempt to recover in the action against Ballard, not for the trespass committed by him, but for a trespass by Cook in a separate parcel, for which, indeed, there has already been a recovery. The case, therefore, falls within the ruling in *Carson* v. *Burnett*, and this point is for the defendant, which renders it unnecessary to consider the other points reserved.

PER CURIAM. Judgment affirmed.

P. G. BUMGARNER v. JOHN MANNEY.

The record of the removal of a cause from one county to another is not relevant nor proper evidence, to be submitted to do the jury on the trial of the case, and counsel have no right to draw any inference from it in their remarks to the jury.

Appeal from the Superior Court of Law of LINCOLN County, at the Special Term in July, 1849, his Honor, Judge *Dick*, presiding.

This case originated in the county of Catawba, where the parties lived, and was removed by the plaintiff to the superior court of Lincoln. On the trial, the defendant's counsel stated to the jury, that the plaintiff was not willing to try his case in the county of Catawba, where he lived and was known, but had it removed to the county of Lincoln. The plaintiff's counsel objected, that there was no evidence before the court, how the case got to that court. The defendant's counsel then offered to read the certified copy of the record of the case sent from Catawba. This was objected to. The court decided, that the record was in evidence, and that the defendant's counsel had a right to allude to it in his remarks if he thought proper. Verdict for the defendant, judgment and appeal.

*Boyden*, for the plaintiff.
*Craige*, for the defendant.

NASH, J. We think his Honor erred. The record of the case was not in evidence before the jury and could

not be. It neither proved nor had it a tendency to prove any issue, which was or could be submitted to the jury. With the motives of the plaintiff in removing his case to the county of Lincoln, they had nothing to do. It would be a rare thing, that the law has authorized a party to remove a case, for the purpose of procuring a fair and impartial trial, if this liberty, which the law secures to him, is to operate the very evil the law intended to remedy. For what purpose was the fact of the removal brought to the notice of the jury? The counsel told them, to show them, that the plaintiff was not willing to be tried by those who knew him. If this was a case in which the plaintiff's character was in issue, the law has pointed out how it is to be proved; certainly not in this way. The remarks of the defendant's counsel were irrelevant and not supported by any testimony in the case, and the only effect they were calculated to have was to mislead the jury. The court ought to have stopped the counsel, or, if he did not think proper to interrupt the course of his remarks, always an unpleasant duty, he ought to have instructed the jury to lay them aside entirely in making up their verdict. This however was not done, but by ruling that the record was in evidence, and that the counsel had a right to remark upon it, the judge added the sanction and weight of his authority. In this we think he erred. The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and *venire de novo*.

ESTHER THOMAS v. JOHN THOMAS.

On a petition for dower, when it appeared that the deed, under which the widow's husband claimed, had been delivered, but had not been registered at the time of his death and could not since be found; *Held*, that the husband did not die seized, and the widow had no right to recover her dower, at least in a court of law.

The cases of *Morris* v. *Ford*, 2 Dev. Eq., 418, and *Tolar* v. *Tolar*, 1 Dev. Eq., 456, cited and approved.

Appeal from the Superior Court of Law of IREDELL County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

The plaintiff filed her petition in Iredell county court, setting forth, that she was the widow of John Thomas, Junior, who died intestate in 1845, leaving an infant daughter his only heir-at-law; that the said John died, seized in fee of a tract of land described in the petition, and prayed that a writ of dower should issue to the sheriff of the said county, commanding him to summon a jury to set apart to her dower in the said land. The petition also prayed that copies of the petition should be served on John Thomas, Senior, and upon the guardian of the infant heir-at-law. The defendant, John Thomas, Senior, pleaded that *he* was, at the time of the death of the husband of the petitioner, seized in fee in severalty in the premises described in the petition. On the trial of the issue, which was made up, it appeared that the defendant, John Thomas, was formerly the owner in fee of the premises. The plaintiff's counsel offered in evidence a notice, which had been served upon the defendant, Thomas, notifying him to produce, on the trial of the suit, a deed, which, it was alleged, he had made to the husband of the petitioner; and, as the alleged deed was not produced, the

petitioner's counsel offered to prove that the defendant, Thomas, executed a deed in the lifetime of his son, the said John Thomas, Junior, by which the premises, described in the petition, were conveyed in fee to the said John Thomas, Junior; that the said deed was duly delivered, and remained in the possession of the bargainee during his life, and, after his death, the defendant Thomas obtained possession of it. It was admitted by the petitioner's counsel that the deed had never been registered. This evidence was objected to, and the judge ruled, that the evidence was inadmissible, to prove a seizin in fee in the husband of the petitioner. The jury found a verdict in favor of the defendant, and judgment was rendered accordingly, from which judgment the plaintiff appealed.

*Avery*, for the plaintiff.
*Boyden*, for the defendant.

NASH, J. We concur with his Honor in the opinion appealed from. The plaintiff filed her petition to procure an apportionment of dower in the land set forth in it. She states, that she is the widow of John Thomas, who was the son of the defendant, and that he died seized and possessed of the land described in the petition. The defendant filed a special plea, setting forth, that his son, John, was not, at the time of his death, seized and possessed of the land in controversy, but that he was. On the trial of the issue joined between the parties, the plaintiff offered to prove, after notice to the defendant to produce it, that the defendant had made and executed to his son, John, then her husband, a deed of conveyance in fee simple for the land; that it was duly delivered and remained in his possession up to the time of his death, when the defendant obtained possession of it, and it has not been since seen. The case shows that the deed never

was registered. This testimony was rejected. The proceeding in this case is at law, to establish a legal right. The testimony rejected was not competent to that purpose. The husband, John Thomas, never was seized and possessed of the land, but, at the time of his death, had only an incomplete legal title. *Morris* v. *Ford*, 2 Dev. Eq., 418. If a widow be entitled to dower in land, to which the title of her husband was, at the time of his death, in that state, she cannot recover it at law, because, being incomplete at law, she cannot give legal evidence of his seizin. It may be, that she may have relief in equity, as her husband would have had. *Tolar* v. *Tolar*, 1 Dev. Eq., 456. The equity, in that case, would be, not in the nature of the right, but to have the benefit of the legal title, which has been lost by spoliation. The relief is, a reconveyance with covenants *against* intermediate incumbrances, or acts of the party making it. *Tate* v. *Tate*, 1 Dev. & Bat. Eq., 23.

PER CURIAM. Judgment affirmed.

MARTIN RICKMAN v. WILLIAM R. WILLIAMS.

A justice of the peace, before whoma warrant is tried, is not permitted to sign the name of a surety to the stay of execution, even though the person, whose name is signed, afterwards assents to it and pays the judgent.

It seems that none but the surety himself or one for him in his presence can sign his name to the stay of a justice's execution.

When a surety signs a stay of a justice's execution, without any request from the principal, and afterwards pays it, this a mere voluntary payment and gives him no cause of action against the principal.

The case of *Weaver* v. *Parish*, 1 Hawks., 319, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

The plaintiff brought an action of debt on a bond, and the only question on the trial was a set-off, claimed by the defendant. As to that, the facts were these: One Patillo warranted one David Williams and the plaintiff on a bond, and recovered judgment for $47.32, and the justice then made this entry on the warrant: "The defendant prays the stay of execution and gives for security W. R. Williams." The entry purports to be signed by W. R. Williams, the present defendant, but in fact it was not. The justice was examined on the trial and stated, that the defendant was not present at the time, and that he signed the defendant's name in his absence, but that, afterwards, though how long afterwards he could not remember, he informed the defendant, that he had done so, and the defendant then told him his name might stand; and he subsequently paid the debt to Patillo. The court was of opinion, that the defendant was not entitled to the set-off; and the defendant submitted to a verdict and judgment, and appealed.

*J. W. Woodfin*, for the plaintiff.
*Baxter*, for the defendant.

RUFFIN, C. J. There is no objection to the set-off on the ground of a want of mutuality, although the demand of the defendant is for money paid for the plaintiff and another; for, as the contract is, in our law, joint and several, the defendant could sue the plaintiff separately, and therefore he may have the set-off, in this action by the plaintiff alone, instead of being put to his cross-action. Yet we think the judgment must be affirmed, upon the ground, that the defendant was not bound for the debt, and therefore that the payment is to be considered voluntary. In order to bind a surety for the stay of execution, the act requires, that his acknowledgment should be entered on the warrant and be signed by the party, and it has been held, that the magistrate, even upon the previous request of the surety, cannot sign his name in his absence. *Weaver* v. *Parish*, 1 Hawks., 319. It may well be questioned, whether a signature by any one but the surety personally, or at least by one in his presence, can bind him, although in that case the decision was placed on the narrower footing, that the justice cannot thus blend his judicial functions with those of attorney for the party. For, the provision, that the acknowledgment should be entered in writing and signed by the party, is obviously in the nature of a statute against frauds and perjuries, and was intended to prevent a prejudice by falsehood, either to the creditor or the supposed surety. The law makes the acknowledgment conclusive, in the nature of a judgment, on which execution may be issued without further notice; and as there are no attorneys, as responsible officers of the law, to whom the party can give a warrant to appear for him before the justice, it would seem, that the just construction of the act is according to its letter, that the stay must be signed

by the party himself. Whether he be the person he represents himself to be, it must be supposed the magistrate will generally know, or can easily ascertain, as well as his sufficiency in point of property. But it can hardly have been the intention of the legislature to impose on the magistrate the duty of passing on the fact or the sufficiency of the authority, given by an absent person to another, to enter him as surety for an appeal or stay of execution, and the decision thereon of the magistrate should be final, and bind the surety conclusively, as upon a judgment for the debt. Such a construction would expose the supposed parties to much imposition; or, if the surety could be relieved upon shewing the fraud on him, it would equally endanger the creditor's rights, whose debt may have been lost by the delay. But, however that may be, the case cited establishes, that the signing of the surety's name, in his absence, by the justice, is void; and consequently, the defendant was under no obligation to pay the debt. His subsequent assent amounted to nothing; for it does not appear, that he saw the judgment or knew the amount of it, or the parties to it, or even that it was within the period, in which the magistrate had power to receive a surety for the stay. Nor does it appear, that the defendant's assent was given in the presence or with the knowledge of the plaintiff, and therefore no request by the principals to the defendant to pay the debt can be inferred; which circumstance distinguishes this case from that cited by the defendant, *Alexander* v. *Vane*, 1 M. & W., 511, in which the presence of the defendant, when the plaintiff verbally promised to pay the debt, was held to be an authority and request to the surety to pay the debt, and implied an agreement to repay it. But there is in this case, nothing to shew that the plaintiff had any knowledge that the defendant undertook in any way to pay the money, or that he had paid it.

PER CURIAM. Judgment affirmed.

EDMUND BRYAN v. W. J. T. MILLER, et al.

When an administrator or executor, after the delay of nine months allowed by act of assembly, Rev. St., c. 46, sec. 25, pleads to an action the want of assets, he has a right to give in evidence a judgment confessed, prior to the time when the plea is pleaded, without regard to the priority of the time in bringing the suits.

The cases of *Grier* v. *Combs*, Tay. Rep., 395, and *Hall* v. *Gulley*, 4 Ired., 345, cited and approved.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

The question on the trial in this case was upon the defendant's plea of *plene administravit.* The facts were agreed to be these: The defendants administered the 11th day of December, 1843, and, on the same day, the plaintiff served a warrant on them in debt on a bond for $83.51, and the justice, at the instance of the defendants, postponed the trial to September 11th, 1844. Upon the trial before the magistrate, the defendants insisted on their want of assets, and, thereupon, the suggestion was endorsed on the warrant, and, after a judgment for the debt, interests and costs, the justice returned the warrant to the next county court, held on the fifth Monday after the fourth Monday of September, 1844, and the defendants pleaded in court fully administered, and judgments confessed on specialties, and no assets ultra. The defendants in fact received assets to the value of $3,852.44; but, including the expenses of the administration, disbursed the sum of $4,129.29, in discharge of judgments on bonds rendered by confession prior to September, 1844, in suits brought after December 11, 1843. Therefore

the court instructed the jury to find for the defendants on the plea of *plene administravit;* and from the judgment the plaintiff appealed.

*Gaither* and *Guion*, for the plaintiff.

*Bynum* and *Baxter*, for the defendants.

RUFFIN, C. J. It was argued for the plaintiff, that the administrators' confession of judgments, in suits brought after that of the plaintiff, is in effect the same thing as making voluntary payments to one creditor after suit brought by another, and therefore that it ought not to be allowed. But it is perfectly settled, that the executor has the right to make that preference, before he pleads. 1 Hay., 295; *Grier* v. *Combs*, Tay. R., 138. The reason why the executor should be enabled to do so, is well explained by Lord ELLENBOROUGH in *Tollput* v. *Wells*, 1 Maul. & Selw., 395, and both the rule and reason were approved by this Court in *Hall* v. *Gulley*, 4 Ired., 345. It might, perhaps, have been doubted, whether the court ought to give leave to an executor to delay pleading, in order to give him time to appropriate the assets, so that he could plead safely; or whether the leave thus given should have the effect of working prejudice to a creditor first suing. But the practice on that point seems to be settled in England, and, at all events, in this state, it is expressly provided by the act of 1828, that an executor may have nine months to plead, and that, then, he may have any plea, relative to the assets, which could be pleaded, had the suit been instituted at that time. Rev. Stat., ch. 46, sec. 25. Therefore, it is clear that the plea in this case does not, under the statute, relate to the commencement of the suit, or any other point of time prior to that, at which the executor is bound to plead, after the expiration of the nine months. In this case, the defendants had, at the time of plea, paid more on the debts of the

intestate and the necessary expenses, than the whole amount of assets; and therefore the directions to the jury were right.

PER CURIAM. Judgment accordingly.

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THE STATE v. MATTHEW WILSON.

Upon the trial of an issue in a bastardy case, whether or not the defendant is the father of the child charged to him, it is not competent to introduce any testimony to shew that the child was not a bastard.

The adjudication of that question belongs to the justices before whom the oath of the woman is made, and if they decide against him upon that question, he has a right to bring up by *certiorari*.

The case of the *State* v. *Barrow*, 3 Murp., 121, cited and approved.

Appeal from the Superior Court of Law of CATAWBA County, at the Fall Term, 1847, his Honor, Judge *Pearson*, presiding.

This is a proceeding in bastardy, in which the defendant was charged as the father of a child of Mary Huffman. At his instance an issue was made up, whether the defendant was the father of the said bastard child, or not.

On the trial, the examination of the mother was given in evidence on the part of the State, and therein she charged the defendant to be the father.

On the other side, evidence was then given, that the said Mary and one Lawson Huffman intermarried in 1840 and lived together in Catawba county for some months, and that, then, the husband left his wife and went to one of the western states; that about the 1st of October, 1843,

he returned to Catawba and resided there in the vicinity of his wife and frequently slept in the same house with her, until March, 1844; but not in the same bed, except that on one occasion, the particular period not mentioned, he rose in the night from the bed in which he was lying and went to that in which his wife was: That in March, 1844, the said Lawson again left the State, and had not been since heard of; and the said Mary remained in Catawba and had the child there on the 19th of July, 1844.

The counsel for the defendant moved the court to instruct the jury that upon this evidence, if believed, the child was deemed in law the husband's; and, therefore, that the defendant could not be found to be the father.

But the court refused the instruction; and then informed the jury that, although there was such a legal presumption as that mentioned, when the husband and wife had opportunity of intercourse, yet it could not determine the issue—which was, whether the defendant was or was not in fact the father—because, as to that, the law raised also a contrary presumption from the examination of the mother; and that, therefore, the question was to be determined on those opposing presumptions and any other evidence, upon the matter of fact; and that they ought to find against the defendant, if upon the whole evidence, they believed that he was the father of the child.

The issue was found against the defendant, and he appealed.

*Attorney General*, for the State.

No counsel for the defendant.

RUFFIN, C. J. It is probably true that, upon the evidence of access in this case, the law would presume conclusively that the issue is legitimate. And it is certain the oath of the wife, by itself, was not sufficient, at com-

mon law, to bastardize her issue, so as to exonerate her husband from its maintenance and charge another person with it; and we suppose that the act of 1814 has not made any change in that respect. But it seems to the Court, that those questions could not be raised in the manner and in the stage of the case, in which they were here brought forward. If they could, we are not prepared to say the question of paternity was not left to the jury properly, under the statute, upon the contrariant legal presumptions, aided on the one side or the other by other circumstances.

But we need not consider that point, as the Court hold, that, on the trial of this issue, no part of the defendant's evidence ought to have been heard, for the reason, that it was irrelevant, and, indeed, contradictory to the admission or implication in the issue, that the child was a bastard. That, we think, will be apparent upon considering the difference between the several questions thus presented, the state of the law before the act of 1814, and the alterations introduced by it.

When it was held, notwithstanding the statute spoke only of single women, that the true question under them was, whether the child, sought to be affiliated, was a bastard, and therefore that a man might be charged, as the father of a married woman's child, the necessary consequence was, that he could be so charged, only when such circumstances were found upon competent evidence, as to constitute the child a bastard in law; since every married woman's child is *prima facie* the issue of the husband. Hence, the mother appearing in the proceedings to be married, it was requisite the conviction should state the impotency or non-access of the husband, and that it was proved otherwise than by the wife; as she was only competent, and that, from necessity, to prove the criminal conversation, of which the child was the fruit. Of course, it would be open to the accused, before the justices, to offer evi-

dence of access or opportunity of access of the husband, and thereby seek to establish the legitimacy of the child; and it would be for the justices, upon the whole evidence and according to its legal weight, to determine, whether the child was legitimate or a bastard. If the former was found, as established by the proofs, the party accused was to be at once discharged; and if the latter, the party was conclusively fixed as the father. In the first case, the party was necessarily discharged, although the justices might believe, upon the oath of the mother, that he was in fact the father; for the reason, that, nevertheless, the child could not legally be adjudged a bastard. It is, thus manifest, that, the first enquiry in such cases is, whether the child be a bastard, or not. That is preliminary to and altogether distinct from the enquiry, who, supposing the child to be a bastard, is the father? Now, it was at all times the course for the superior courts in England to re-examine, upon *certiorari*, orders of bastardy in such cases, and to quash them, when impotency or non-access of the husband did not appear in them to have been established upon evidence, which was not apparently incompetent. It was a settled jurisdiction at common law. *Rex* v. *Reading*, Rep. Temp. Hardw., 19; *Rex* v. *Rooke*, 1 Wils., 340; *Rex* v. *Luffe*, 8 East., 193. Of course it existed here, also, as was distinctly stated in *Barrow's* case, 3 Murp., 121. There, a mother of mixed blood charged a white man, and the court said, that, independently of the act of 1814, the county court could not rightfully charge a person, if it appeared that the magistrates proceeded against law in their judgment; for that, in summary proceedings, justices of the peace must observe the course of the common law in raising a charge against the party, giving him notice of trial and opportunity of defense, and, unless a statute direct otherwise, receiving only such evidence against him as the common law approves. It is true, there is an intimation

that, by virtue of the act of 1814, the objection to the mother's competency might be taken by plea, that she was of mixed blood. But it is obvious that was an inadvertency; for, in the first place, that act gives no such issue, but only that the party charged is not the father; and, in the next place, it is the province of the court to decide every question of competency of evidence, and it cannot, in any case, be referred to the jury, either as to the matter of law or the matter of fact, on which the question of law is raised. The issue given by the statute had not been tendered in that case. The party had asked leave to plead that the woman was of mixed blood within the fourth degree. In substance, then, it was a motion to quash on that ground, which was overruled, and carried up by appeal; and the act of 1814 had nothing to do with the matter. Indeed, the court said expressly, that the party was entitled to the redress, independently of the act. Such having been the law, a person who was about to be charged improperly with the maintenance of a child of a married woman, with which another was already chargeable in law, as the father by legal presumption, had a direct and adequate remedy by *certiorari* at common law, or by a motion to quash in the county court, and an appeal to the superior court, under our statute. There was, therefore, no occasion for a special statute to afford a remedy in such a case; nor is there any ground for carrying the act of 1814, by construction, beyond its words and apparent purport, for that purpose.

If there were no other fit remedy, then, perhaps this case might be deemed within the mischief, and brought within the operation of the act. But as that was not at all true, the act, although remedial, is to be confined to the case and the remedy mentioned in it, and not be extended beyond its language and obvious scope, so as to embrace a case, in which there was before fit and ample redress.

The question then recurs, what are the words and purposes of the statute? The enactment is, that when a man is accused by a woman "of being the father of her bastard child, he shall be entitled to have an issue made up to try, whether he be the father of such child." Furthermore, it makes the examination of the woman *prima facie* evidence, on the trial, against the accused. Since it was manifest, as already remarked, that, under the act of 1741, it was essential, before entering on the enquiry, who was to be charged as the father of the child, that it should be determined, that such child was a bastard, so it continues to be, notwithstanding the act of 1814; for it is obvious that it is assumed in the latter act to have been duly determined, that the child is a bastard, before the accused tenders the issue, that he is not the father. Indeed, the bastardy is impliedly admitted in the issue itself. It is not, whether the child be a bastard or not. No such issue is given. But the act is, that one, charged with being the father of a *bastard* child, may aver that *he is not* the father of *such* child. That puts in issue the very fact of begetting the *child*, and nothing more. The man may clear himself by shewing non-access or impotency, or any other natural fact, inconsistent with his paternity, and, were it not for the peculiar force given by the statute, according to its necessary construction, to the examination of the woman, as evidence to the jury, the party might also, if practicable, give evidence that another person was the father, and thus, negatively disprove his own paternity. But, even in that case evidence, either direct or presumptive, of the paternity of the husband must, of necessity, be excluded, since it would be contrary to the implication, in the issue, of the bastardy of the child. This construction is fortified by the provision, which makes the examination of the mother *prima facie* evidence against the accused; that is, to support the issue throughout, on behalf of the State. For, if the

legitimacy or illegitimacy of the child be involved in the issue, then the evidence of the wife would not only be made evidence of the non-access of the husband, but, by itself it would be made sufficient evidence thereof, unless disproved by the accused. The rule of evidence, upon so essential a point, ought not thus to be changed by a side wind. It is clear, that it was not in the contemplation of the legislature, and, indeed, is in opposition to the policy of the act, as set forth in the preamble. The mischief recited is, that the oath of the woman was conclusive evidence against the alleged father: which, instead of suppressing vice, had a contrary effect, by encouraging abandoned women in their courses with low and poor men, as they were able, by perjury, to lay their offspring to men of character and property; and, the remedy enacted is, that her examination should be *prima facie* evidence only. Thus it is seen, that the purposes of the act were to restrain the operation of the mother's oath, and impair its effect under the act of 1741, and by no means to enlarge it by rendering it competent to a point, to which at common law and by that act it was not. In other words, the act was made for the relief of a man falsely accused, and intended to enable him the better to defend himself by disproving the woman's oath that he begat a child by her, otherwise proved to be a bastard—and not to give such an effect to her oath, as to make it in itself evidence, much less *prima facie* evidence, of the bastardy of the child. Then, whether regard be had to the state of the law previously, or to the language or policy of the act of 1816, the conclusion is, that the illegitimacy of the child is assumed and admitted in the issue tendered by the defendant, and, therefore, that it was not competent for him to give evidence, on the trial of the issue, of the husband's access, or of any other fact tending to establish the legitimacy of the child. In the

issue he put himself on *the fact*, that he is *not*, while the State affirms that *he is*, the father of the child.

It will be readily perceived, that this determination acknowledges the right of the man charged, to insist, that the child is legitimate, and so, that he cannot be saddled with the maintenance; and that it only excludes him from so insisting upon the trial of the issue. For the reasons given, it seems clearly better for him, that he should present that point by itself, and before he raises the other question, namely, whether he be the father, supposing the child to be a bastard; and likewise it promotes the public justice and that due to the mother, to separate those enquiries, and thereby prevent surprise on either side in disposing of them. The judgment must therefore be affirmed; and this decision must be certified to the superior court, with directions to that court to bind the defendant to appear at the county court, and to issue a writ of *procedendo* to the county court, to take the bond from the defendant for the maintenance of the child, &c., as prescribed in the statute.

PER CURIAM. Ordered accordingly.

GEORGE W. B. HISE, Executor, &c. v. JOSHUA FINCHER and Wife.

Where a testator, being sick in bed, called for his will and directed his son to burn it, and instead of doing so he retained the will and burnt another paper for the purpose of deceiving his father, and the father was thus deceived into the belief that his will was burnt; *Held*, that this did not amount to a revocation, the will not having been actually burnt.

Appeal from the Superior Court of Law of BURKE County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

A paper writing was propounded, as the last will of George Hise, deceased, by George W. Hise, and the probate was opposed by Joshua Fincher and his wife, Elizabeth, who is a daughter of the party deceased; and an issue of *devisavit vel non* was made up under the direction of the court. The script purports to bear date the 22nd of June, 1843, and to devise and bequeath land and chattels to the widow of the deceased, to his son the said George W. Hise, who is also nominated the executor, and to contain devises and bequests to four other children of the deceased, with a limitation over of the shares given to a daughter, Selina, upon her death, without leaving issue, to the heirs of George W. Hise; and it is stated, that Selina died in the lifetime of her father, under age, and without leaving issue.

On the trial, the due execution of the instrument, as a will to pass both real and personal estate, was proved and not disputed; and the only question was whether it had been revoked or not. To establish a revocation, a witness was called for the caveators, who stated that George W. Hise, the propounder, was speaking to him concerning the

paper writing in issue, whether before or after the testator's death does not appear, and said to him, "my father" (the party now deceased) "was lying sick in bed and requested us to bring him the will; the will was brought to him and he requested us to throw it into the fire and burn it; but I held the will and another piece of paper in my hand at the same time, and, for the purpose of deceiving my father, I threw the other paper into the fire in his presence, instead of the will, and put the will in my pocket." Thereupon the court instructed the jury that the burthen of proof was on the caveators to establish a revocation, and, to that end, it was necessary that the jury should not only be satisfied that the witness told the jury the truth in giving the declarations of George W. Hise, but also that those declarations were true. But, if therefrom they should believe, that George Hise, being desirous of revoking his will, requested his son, George W. Hise, to bring the will and throw it into the fire, and the son threw another paper into the fire, which was burned, and which the father believed to be his will, and the paper now offered as the will was secretly retained by the son George W., for the purpose of deceiving his father, and the father was thereby deceived, then, it was in effect the same as if the paper, purporting to be a will, had been burned, and it was, in law, revoked. The jury found the revocation, the court pronounced against the paper, and the propounder appealed.

*Avery* and *Gaither*, for the plaintiff.

*N. W. Woodfin*, *Craig* and *J. W. Woodfin*, for the defendants.

RUFFIN, C. J. Upon the supposition that the evidence of George W. Hise's declarations were admissible to affect the interests of the other devisees, the Court is of opinion that there was, yet, error in the effect given to

them, as establishing, if true, a legal revocation. The act of 1819, Rev. Stat., ch. 122, sec. 12 and 13, contains substantially the same provisions on this subject with those of Stat. 29, Charles 2, and therefore is to receive the like construction. No devise of lands nor will of personalty, is revocable, otherwise than by some other will, or writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the devisor or testator, or in his presence and by his direction or consent, and all devises of land and bequests of personal estate "shall remain and continue in force, *until* the same be burnt, cancelled, torn or obliterated by the devisor or testator, or in his presence and by his consent and direction, or unless the same be altered," &c. It is obvious, that the main purpose of the act is to alter the rule of law, by which the revocation of a written will, duly attested, could formerly be established by parol proof merely; and that is done, by requiring the intention to revoke to appear, not merely from the mouths of witnesses, but also by some overt act, apparent in another writing, or on the paper itself, alleged to have been revoked. It is to be done by another will or writing, or by the destruction of the paper by burning, cancelling, tearing or obliterating. Now it is impossible to say here, that the paper was *burnt*, cancelled, torn or obliterated. It is true a great fraud was practised on the dead man by his son's pretending to burn the will, while he in fact preserved it; that is, if it can be assumed upon the evidence, that such were the facts. But the very question is, whether upon this parol evidence, by itself, an intention to revoke can be found, or, if the intention be granted, whether the law will allow such intention to burn and revoke to be, in fact and law, a burning and revocation. The statement of the question seems to furnish an answer to it in the negative. The statute positively requires things to be done, and not merely said or intended to be done. The Court cannot dispense with those acts, upon

the ground, that, in requiring them, the statute put it in the power of a bad man to deceive and defraud a testator. That was for the consideration of the legislature; which body has, nevertheless, used language on the subject which is clear and explicit, and which, therefore, the judiciary must observe, though, in a few very extraordinary cases, it admits the possibility of fraud and imposition. For it is clear, the legislature deemed it the better policy to submit to that inconvenience, in a solitary instance, now and then—since human sagacity is not competent to guard perfectly against fraud of every kind—than to let in the more extensive and frequent mischief, arising from perjuries committed in proving verbal directions to burn or cancel a will, and a supposed belief of the testator, that it had been done. We conceive the words of the act are diametrically opposed to the hearing of any evidence of the kind, and that, to effect a revocation of a will, there must be deeds, within some one of the definite words used. The counsel opposed to the will have adduced but one case, having any analogy to the present, and that is very slight. It is that of *Bibb* v. *Thomas*, W. Blac. Rep., 1043, where the will was slightly torn by the testator and thrown by him into the fire and slightly burned, and it was *held*, that it was revoked, notwithstanding another person took it out of the fire, and preserved it, without the knowledge of the testator. But the reason given for it was, that the case fell within two of the specific acts described in the statute, namely, tearing and burning; for, though the burning was very slight, yet, having come from the act of the testator in throwing the paper on the fire, with intent to burn it, that was sufficient within the statute. In *Doe dem. of Reed* v. *Harris*, 6 Adolph. & El., 209, Lord DENMAN, in speaking of that case, expresses a doubt, whether the proof there would now be deemed sufficient. But it is not necessary to question it at present, as our

case is essentially different in the very facts, on which *Bibb* v. *Thomas* was put, since here neither tearing nor burning happened in the slighest degree. And, on the contrary, the case of *Doe* v. *Harris* is directly in point to the question before us. There, an old and infirm man threw his will, inclosed in an envelope, into the fire, and a devisee in the will snatched it off, a corner of the envelope only being burnt, but promised the testator to burn it, and pretended to have burnt it. Yet the court was unanimous, that the will remained in full force, and that very devisee recovered under it in ejectment. It was so held, by force of the words, requiring the palpable acts of burning and so forth, in exclusion of intentions and unexecuted attempts, shewn merely by parol, which it was the policy of the law not to hear by itself. The judgment in that case proceeds, we think, upon a sound interpretation of the statute, and it is decisive of the question here. Indeed Mr. Justice WILLIAMS, in his argument, puts, by way of illustration, the very case stated in this bill of exceptions. His words are these: "It is argued, that, if a testator throws his will on the fire, with the intention of destroying it, and some one, without his knowledge, takes it away, that is a fraud, which ought not to defeat his act. But so it might be said, that, if a testator sent a person to throw it on the fire and he did not, the revocation was still good. Where would such constructions end? The effect would be to defeat the object of the statutes, which was to prevent the proof of cancellation from depending on parol evidence." The case is the stronger, because, in a subsequent case, the court held, upon the same facts, that, as to copy-hold lands, which are not embraced in the statute of frauds, this will was revoked. *Doe dem of Reed* v. *Harris*, 3 Adolph. & Ellis, 1.

PER CURIAM. Judgment reversed and *venire de novo*.

JAMES RUTHERFORD v. WILLIAM RABURN, et al.

Under the act of 1848, ch. 53, on the trial of an ejectment, brought by a purchaser at an execution sale against the defendant in the execution or one bound by its teste, no judgment need be shewn; all events unless the purchaser be the plaintiff in the execution.

In cases, where it is necessary to produce the judgment, as where the opposite party claims under a prior conveyance, a variance between the judgment and the execution will not avoid the proceedings under the execution; provided enough appears to enable the court to see, with reasonable certainty, that in fact the execution was issued and intended to enforce the particular judgment.

In this case, the note, on which the judgment was obtained, was payable to the firm of "Lester Kilgore & Bates," the judgment was in the name of "Philip Lester, Josiah Kilgore and William Bates," and the execution was in the names of "P. Lester, Kilgore & Bates," and for the same amount as the judgment; *Held*, that the variance in the names came within the mischief, intended to be remedied by the act of 1848, and did not vitiate the execution.

Although land alone is mentioned in the act of 1848, it seems to be the unavoidable interpretation of it, that the sales of personalty, under execution, must, in like manner, be upheld, as being within the mischief.

The cases of *Hamilton* v. *Adams*, 2 Murph., 161; *Dobson* v. *Murphey*, 1 Dev. & Bat., 591, and *Collais* v. *McLeod*, 8 Ire., 221, cited and commented on. The cases of *Weaver* v. *Cryer*, 1 Dev., 337, and *Farley* v. *Lea*, 4 Dev. & Bat., 169, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This action was tried in April, 1849, and the lessor of the plaintiff claimed title, as a purchaser, under a judgment and *fieri facias* against Hodge Raburn. A transcript of the record was given in evidence, and it appeared therein, that an action of debt was brought by Philip Lester, Josiah Kilgore and William Bates, on a bond

given by Hodge Raburn to a firm called, "Lester, Kilgore and Bates," and that judgment was recovered for $206.28 principal money, and $48.13 damages for interest, and the costs; and that thereon a *fieri facias* was issued for the said debt, damages and costs, purporting, however, to be on a judgment by "P. Lester, Kilgore & Bates." The defendant William Raburn claimed under Hodge Raburn, and he objected, that the sheriff's sale did not pass the title, because of the variance between the judgment and the execution, in the names of the creditors. The court, being of that opinion, nonsuited the plaintiff and he appealed.

*J. W. Woodfin* and *Bynum*, for the plaintiff.

*N. W. Woodfin* and *Avery*, for the defendants.

RUFFIN, C. J. Until the case of *Hamilton* v. *Adams*, 2 Murph., 161, it was understood, that the law here was the same as in England, and that the execution not only justified the sheriff, but that the purchaser under it need shew nothing more, as against the defendant himself, or one coming in after the lien of the execution attached. *Lake* v. *Billers*, 1 Ld. Raymond, 753; *Dobson* v. *Murphey*, 1 Dev. & Bat., 591. It was a rule of convenience, and also of policy, for the safety of purchasers, and thereby to induce a confidence in bidding and buying, at a fair price. But in the case first mentioned, it was held, nearly forty years ago, that a purchaser must shew a judgment as well as an execution, and that has been followed ever since, though the reasoning in the case is certainly not satisfactory. It is, that it was a sacred, and, indeed, a constitutional right of every man, to have notice, and the opportunity of defense, before he should be concluded, and therefore that there must be a judgment; and it was thence inferred, that the record of the judgment must be produced by a purchaser, as the only evidence of it, since

it could not be presumed from the ministerial act of the clerk, in issuing the execution, and it would not be material, whether it existed or not, if it were not required to be shewn in some manner. This will appear the more singular, when it is considered, that the same reasoning, so far as the judgment is necessary to give validity to the execution against the defendant, embraces the case of the sheriff, as well as the purchaser; for it is clear that the officer can no more justify under a void process, than the purchaser can deduce title through it. Yet it has never been questioned, that the sheriff is justified by the writ alone; but, on the contrary, the affirmative has been constantly held here, as in England. *Weaver* v. *Cryer*, 1 Dev., 337; *Farley* v. *Lea*, 4 Dev. & Bat., 169. But the truth is, that the principle of hearing a person, before passing on his rights, was always as sacred as it is now, and strictly observed at the common law. There is no doubt, then, that the law requires a judgment to support an execution. Yet, it does not follow, that the judgment must be proved by the production of the record, on the trial of a suit for the property sold under the execution. For, although the acts of a creditor in suing, and of a ministerial officer in issuing, the execution, do not, of themselves, authorize a presumption, that there is a corresponding judgment, there are, yet, other things in every case, from which there is a fair and almost necessary presumption of the existence of a judgment. They are, the power and duty of the court, from which the process emanated, to set it aside, and the omission of the party to have it set aside. Undoubtedly the court would, at the instance of the defendant, set aside the execution, if there were no judgment. Even if there be one, yet if the execution did not conform to it, and a prejudice appeared to have arisen to the debtor from the variance, the court would be bound, in that case also, to set it aside. As if there had been a judgment for $10, and a *fieri facias*

be taken out for $1,000, so as to cause, for its satisfaction, the sale of a valuable tract of land or several slaves, instead of a cow or some other trifling article. The question then, really, was only in what manner advantage was to be taken of the want of a judgment or of a variance between it and the execution. The ancient rule was founded on the idea that such a question was most proper for the court, whose process had been abused, because it would there be presented directly, and justice could be done all around—to the sheriff, the parties and the purchaser—by setting aside the execution or amending it, on such terms as would save the first harmless for obeying the writ, and would either secure to the last the property bought by him, or restore to him his money forthwith. That is a much more convenient method of determining the validity of the execution, so far as it is dependent upon the validity of the judgment, rather than allow it to come up incidentally in ejectment or trover, whereby the debtor often contrives to have his debt paid out of the proceeds of the property sold, and still keeps the property and puts the purchaser to another action for the money; which is seldom available, by reason of the ultimate insolvency of the debtors. However reasonable those views seem, it was, nevertheless, resolved in *Hamilton* v. *Adams*, that the purchaser must produce the record of the judgment in support of his title, and subsequent judges felt bound by the decision as an authority. It was considered to follow, necessarily, that the judgment, in order to have the effect of sustaining the execution, must be such a one as authorized it, for, if it did not, it seemed to be much the same, as if no judgment were shewn. The inconveniences of thus following out the principle of the case mentioned were numerous and mischievous, defeating many fair purchasers at sheriff's sales upon frivolous objections, down to the June term, 1848, in the case of *Collais* v. *McLeod*, 8 Ire., 221. They have at last been

deemed so grave, as to induce the legislature at the session of that year to pass the act, ch. 53, "to secure the title of purchasers of land sold under execution; which declares, that when land had been sold, or might thereafter be sold, by virtue of any writ of execution commanding the sale thereof, no variance between the execution and the judgment, whereon it was issued, either in the sum, or in the manner in which, or in the time when, it is due, shall invalidate the title of the purchaser. From the terms of the act, the circumstances under which it was passed, and the policy it is calculated to advance, it seems to have been obviously the intent of it, or at least its necessary construction, to re-instate the rule of the common law, of which we have been speaking. Hence, although land alone is mentioned in the act, it seems to be the unavoidable interpretation of it that the sales of personalty under execution must, in like manner, be upheld, as being within the mischief. The act cannot be regarded as enacting a thing new, out and out, and therefore to be strictly construed. But it is rather directed at a particular adjudication, and to be restorative of the common law, to the full extent reached by that principle. So, with respect to the question in this case, the act gives validity to executions, upon a presumption of a proper judgment, or without regard to certain variances between the judgment and execution. And from those considerations we think it is apparent, that the particular variances specified are set down in the act, as examples of such as it was meant should not hurt the process. For, such as that existing here, in not precisely following in the execution the names of the plaintiffs in the suit, stands upon the like reason with those particularly mentioned in the act, and must be considered within the purview of a statute, so obviously intended to be highly remedial. It is not supposed that an execution, between entirely different persons from the parties to the

judgment, could be held sufficient. But when the variance is apparently the misprision of the clerk, and enough is seen in it to satisfy the court, that it was meant for an execution on a particular judgment and between the parties to it, as if the names were very nearly the same, and the execution was acted on and returned, enrolled and certified as a part of the record of that suit. If that were not the truth, it must be supposed the persons affected by it would procure it to be set aside. The subsistence of the execution, therefore, under such circumstances, affords a presumption, whenever it is impeached collaterally, that it is a legal and proper one. Therefore, in effect, no judgment need now be shewn in a suit between the defendant in the execution, or one bound by its *teste*, and the officer or purchaser; at all events, if the latter be not the plaintiff in the execution. That question, however, is necessarily restricted to a controversy between those persons. As against one, claiming under a prior conveyance from the debtor, the judgment is to be shewn for another purpose. As the debtor's alienee is a stranger to the proceedings, and the prior conveyance to him must stand, unless it be succesfully impeached as being in fraud of a creditor, the judgment is indispensable, as evidence, that it has been judicially established, that the plaintiff in the execution was a creditor, within the act of 1715, as was held in the case of *Lake* v. *Billers*, and all the cases since. Then it is to be considered, whether a variance in that case, between the judgment and execution, will avoid everything done under them. We suppose, certainly, that it will not, provided enough appears, as before mentioned, to enable the court to see, with reasonable certainty, that, in fact, the execution was issued on and intended to enforce the particular judgment. That seems to be the settled rule in New York, without any statute, and upon the reasonable idea, that, the process being amendable, ought not collaterally to be held void.

*Jackson* v. *Walker*, 4 Wend., 462; *Swan* v. *Sadlewise*, 8 Wend., 676. Much more must it be so ruled under the act of 1848, unless, upon no fair intendment, the Court could infer, that the variance arose from the misprision of the clerk, but would be obliged to suppose it the wilful disposition of the officer or of the party to oppress the debtor; and it seems to the Court, that the present case, in which the judgment was in the names of three persons, upon a security given them as a firm, and the execution runs in the name of the firm, or nearly so, and for the proper amount, and the judgment and execution are sent in one record, as belonging to each other, must be within the act, if any case can be so held, or the act is to have any operation. Indeed, the cases, in which the question most frequently occurs, are those, in which the purchaser attacks a previous conveyance for fraud; and, therefore, it must be understood, that the legislature had those cases mostly in contemplation. As the trial of this cause was after the act was in force, the variance did not impair the lessor of the plaintiff's title; and therefore the judgment was erroneous and must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

THE STATE v. WILLIAM TRIBATT.

Although it is not proper, in an indictment, to lay an offence as committed against "the act of assembly," instead of saying against the "statute," yet the informality is one of those cured by our act of assembly.

Appeal from the Superior Court of Law of ASHE County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This was an indictment against the defendant for selling spirituous liquors without a license. The offence was laid to be against "the act of assembly"—and upon this ground the defendant moved in arrest of judgment. The motion was sustained by the court, and the solicitor for the State appealed.

*Attorney General*, for the State.

No counsel for the defendant.

PEARSON, J. The defendant moves to arrest the judgment, because the indictment concludes "against the form of the act of assembly," instead of the "statute."

It is best to adhere to established forms, and it tends to promote clearness and precision, always to make use of the same words to convey the same idea. A diversified mode of expression may sometimes add to the beauty of composition, but precision is of more importance in judicial proceedings than beauty.

The word *Statute* has a definite meaning. The word *Act* has a general meaning, and unless other words are added, it may mean *the doing* of any body; but statute, *ex vi termini*, means the doing of a legislative body. Hence, to make the word Act convey the same idea as the word Statute, it is necessary to add "*of the General Assembly*," thus using five words instead of one. The title of our legislature is the "General Assembly." The word *General* is omitted in this indictment, and obscurity arises from the fact, that there is no such body as "The Assembly," properly speaking.

We are of opinion, that the statute, which provides that judgment shall not be arrested by reason of any informality or refinement, where there appears to the court sufficient in the face of the indictment to induce them to proceed to judgment, applies to this case, and that the judgment should not have been arrested. Our attention has been called to the fact, that the same informality existed in the indictment in *State* v. *Gallimore*, 7 Ire., 147. There was judgment in that case, and the prisoner was executed. The informality was not noticed.

This opinion must be certified to the court below, that it may proceed to give judgment upon the conviction.

PER CURIAM. Ordered accordingly.

THE STATE v. ANTHONY J. SHULE.

Upon the trial of an indictment for an affray, after the jury had returned into court and intimated an intention to acquit one of the defendants, but had not announced their verdict, the court told them, that, if they believed the evidence, both of the defendants were guilty; whereupon the solicitor for the State directed the clerk to enter a verdict of guilty as to both, which was done, and the jury, being asked, if that was their verdict, made no direct assent but by a nod from each of them; *Held*, that this proceeding was so irregular and contrary to the established mode, that the judgment should be set aside.

Appeal from the Superior Court of Law of LINCOLN County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

This was an indictment for an affray. After the court had charged the jury, they retired, and, remaining out for some considerable time, at the request of the solicitor, they were sent for by the court. After the jury returned, the court charged them, that, although Jones (the other defendant) had first commenced a battery upon Shule, yet that, if the jury believed the evidence, the defendant Shule was also guilty. After this charge had been given by the court, one of the jurors remarked, that they had agreed to convict Jones, and were about to acquit Shule, which remark was not contradicted nor assented to by any of the other jurors. Whereupon the court gave them a further charge, and, at the conclusion of it, remarked, that the jury could retire, if they thought proper to do so. The jury remained together a few moments in the court room, apparently in consultation. The solicitor for the State directed the clerk to enter a verdict of guilty, as to both defendants. When the clerk had written out the verdict,

the jury were asked to attend to the verdict, which was about to be read by the clerk. The clerk then read the verdict, in the hearing of the jury; and the jurors were then requested by the solicitor to make it known, if any of them disagreed to the verdict, which had been recorded by the clerk. No juror expressed his dissent, but, on the contrary, by a nod, which appeared to be made by each juror, expressed their unanimous assent. From the judgment upon this verdict the defendants appealed.

*Attorney General*, for the State.
No counsel for the defendants.

PEARSON, J. We think there was error in the mode of conducting the trial. There must be a *venire de novo*. There was a departure from the established mode of proceeding, and the wisest policy is, to check innovation at once; particularly, as, in this case, it concerns the "trial by jury," which the "bill of rights" declares "ought to remain sacred and inviolable." The error complained of is, that before the jury had announced their verdict, and, in fact, after they had intimated an intention to acquit the defendant Shule, the court allowed the clerk to be directed to enter a verdict, finding *him guilty*—and after the verdict was so entered, allowed the jury to be asked, if any of them *disagreed* to the verdict, which had been recorded by the clerk; no juror expressed his dissent, but by a nod, which appeared to be made by each juror, expressed their unanimous assent. The innovation is, that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render—and then they are asked, if any of them disagree to it? Thus making a verdict for them, unless they are bold enough to stand out against a plain intimation of the opinion of the court.

The rules of evidence do not allow a *leading* question to be put to a witness; if a party should be allowed to put a question to his witness, and before it is answered by the witness to suggest an answer and ask the witness if it is so?—upon exception, this would be held to be error and a *venire de novo* be ordered. The reason is, that a leading question suggests to the witness, how the party wishes him to answer; tempts him to commit perjury, if he is corrupt, or at all events is calculated to take him by surprise, and sometimes to get an answer from him, which he would not otherwise have made. There are the same objections to leading juries as to leading witnesses, and, in fact, those apply with more force. The judge is prohibited from intimating to the jury his opinion upon a question of fact—the attendant circumstances in this case gave as clear an intimation of opinion as could be imagined.

When a plaintiff fails to make out his case, the judge may say to the jury, if all the evidence offered be true, the plaintiff has not made out a case, and direct a verdict to be entered for the defendant, unless the plaintiff chooses to submit to a nonsuit.

It is in effect a demurrer to the evidence. The plaintiff has no right to complain; for in reviewing the question of law, he has the benefit of the supposition, that the evidence offered by him and the inferences of fact are all true. So when the plaintiff's case is admitted, the whole question turns upon the defense attempted to be set up. If, taking the facts to be as contended for by the defendant, the court is of opinion, that he has made out no answer to the action, it is proper and saves time, for the court to direct the verdict to be entered for the plaintiff. The defendant is not prejudiced, because, upon appeal, the question will be presented in the most favorable point of view for him.

But the present case is not like either of these, for the State had not made out a case, unless the State's witness was believed; and the credibility of witnesses must be passed on exclusively by the jury. It is true, from the cases made out, there could be but little room to doubt, that both defendants were guilty, and the wonder is, why the jury should have hesitated about convicting both. Still that was a matter for the jury, and its being a plain case, although it accounts for, does not legalize, this novel mode in entering a verdict. If allowed, because this is a plain case, it may be extended to cases that are not plain, and become a positive mischief.

The judgment must be reversed and a *venire de novo* issued.

PER CURIAM. Ordered to be certified accordingly.

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WILLIAM W. DAVIS v. E. H. CUNNINGHAM.

Where A. contracted for a piece of land, at the price of $1000, and being unable to comply with the terms, directed the vendors to convey the legal title to B. which was done, and he afterwards leased the land to A. for about $100 per annum, agreeing that when A. should re-pay him the purchase money, he would convey the land to A; *Held*, that, here, there was no usury, at least none that could be reached at law.

Appeal from the Superior Court of Law of BUNCOMBE County, at a Sperial Term in July, 1849, his Honor, Judge *Caldwell*, presiding.

DAVIS v. CUNNINGHAM.

The following is the case, sent up by the judge: This is a suit on the single bill of the defendant for one hundred dollars, executed in October, 1846, and payable the 1st of November in the said year, to avoid which, he pleaded that it was executed on an usurious consideration.

On the trial it appeared, that the defendant had contracted to purchase the land he lived on, in part at a sale made by the clerk and master of Buncombe county, and in part from one Murray; that he was pressed for money to pay for the land and furnish his house, with a view to entertain travelers; that the plaintiff agreed to advance him a thousand dollars, a part of which was paid by the plaintiff to the said clerk and master and to Murray, in full of the purchase money, and the balance to the defendant to fix up and furnish his house, and the said clerk and master and Murray were thereupon directed by the defendant to execute deed for the said lands to the plaintiff, which they did accordingly—the former on the 15th of November, 1841, and the latter on the 17th of the said month. McLure, the clerk and master aforesaid, testified, that the plaintiff said to him, at the time he executed the deed, that he was to re-convey the land to the defendant on the payment of the thousand dollars and a hundred dollars a year for the rent of it, that his money was worth ten per cent. to him, upon which McLure said to the plaintiff, that he had better keep his secrets as to the dealings between him and the defendant. It also appeared, in behalf of the defendant, that the plaintiff had frequently said, that the defendant owed him for rent, and one witness testified, that the plaintiff said, if the defendant did not pay him his rent, he would sell the land. And it also appeared, that the defendant had made various payments to the plaintiff amounting to four hundred dollars, and that a note of two hundred dollars, a part of the said sum, had been given for rent. The defendant offered in evi-

dence a covenant entered into between him and the plaintiff, bearing date the 17th of November, 1841, in relation to the payment of rent and a re-conveyance of the said land, an relied on it as evidence to sustain his plea. It did not appear from any testimony adduced on the trial, that there had been any other dealings between the parties, than those herein set forth. A witness stated, that the value of the land, at the time of the contract between the parties, was a thousand dollars, and that the defendant had on two occasions, rented the said land, with all the improvements, furniture, &c., for considerably over one hundred dollars per year, in his opinion, it was worth more than one hundred dollars per year. It appeared, that the defendant continued to live on the said land and had so lived by himself or his tenants.

It was insisted for the defendant, that the rent of one hundred dollars per year, contracted to be paid by the defendant to the plaintiff, was a corrupt bargain, whereby to exact interest, at the rate of ten per cent. on the thousand dollars advanced. For the plaintiff it was insisted, unless usury was agreed to be paid by the way of rent, when the parties entered into the original contract about the purchase of the land, that the subsequent agreement between them, in relation to the rent and re-conveyance of the said land, would not make it so. And it was also insisted in his behalf, that, as the defendant was not bound in absolute terms, by the said agreement, to pay the hundred dollars per year by way of rent, but might recede from it at pleasure, it did not constitute usury. And it was further insisted for him, that there was no evidence, that the single bill sued on had been given for the rent; also, that the original contract between the parties as regards the said land, was absolute. And the court was moved to charge the jury, according to the views insisted on by the plaintiff.

The court declined so to charge, but told the jury, if the contract, in relation to the rent of the land, at the rate of one hundred dollars per year, was entered into between the parties as a mere cover, so that the plaintiff should receive, and the defendant pay, ten per cent. per annum on the thousand dollars advanced, or any other sum, over and beyond six per cent., that it would be a case of usury; and it made no difference, whether such bargain was made at the original treaty about the said land, or when it was conveyed to the plaintiff, or thereafter. And the court also told the jury, though the defendant had an election, under the original agreement of the parties, to pay rent or not, yet if he executed his note to secure the payment of the said rent, under and by virtue of a contract to pay ten per cent. per annum on the said thousand dollars, or any other sum over and beyond six per cent., that it would be a case of usury. As to the question raised, whether the note in question was executed for the rent of the said land, the court thought there was evidence to be left to the jury, and accordingly left it to them, as a matter of fact for their decision. The court left it to the jury to say, whether the original contract between the parties, about the land, was absolute, or how the matter was.

The jury found for the defendant upon the plea of usury. A new trial was moved for and refused, and from the judgment on the verdict, the plaintiff appealed.

*Baxter*, for the plaintiff.

*Gaither*, *N. W. Woodfin* and *J. W. Woodfin*, for the defendant.

PEARSON, J. If the land had ever belonged to the defendant and he had borrowed $1,000 of the plaintiff, and conveyed the land to him to secure its repayment, with an understanding that the defendant was to remain in possession, under a lease from year to year, at a rent of $100 per

annum until he was able to repay the money, there would be no difficulty in dealing with the case in a court of law, provided the jury were satisfied that it was a contrivance to cover a usurious lending. For the note now sued on would be void. The lease also would be void, and the title remain in the defendant, who would be under no obligation to pay rent for his own land.

But the land never belonged to the defendant, and it is difficult in a court of law, to sustain the view taken of the case in the court below. If it be a cover for usury, it is a cunning and subtle contrivance which can only be reached in a court of equity, and disproves the confident assertion of my Lord COKE, "that the wit of man cannot devise a mode, whereby to evade the statute of usury." The title passed from McLure and Murray to the plaintiff, upon his paying them the balance of the purchase money, which the defendant was unable to pay. No usury is alleged between McLure and Murray and the plaintiff; so that deed cannot be void, and the plaintiff has the title, subject to a right on the part of the defendant to hold the possession, at a rent of $100 per annum, and to call for the title whenever he repays $1,000 to the plaintiff. The plaintiff demands payment of the note now sued on. The defendant says the note is void, being given for rent under an usurious lease, which was contrived as a mere cover. Well, consider the lease void. The plaintiff is entitled to the possession of the land, being in law the owner, and can recover it in ejectment, *King* v. *Manney*, 6 Ire. Eq., and can recover *mesne profits*, which will be equal to and perhaps exceed the annual sum of $100. How can this be otherwise in a court of law? He is admitted to be the owner of the land, and must be allowed to take possession, or to be paid for the use and occupation. The defendant then, is compelled to depend upon the lease; there is no other ground upon which he can stand, and,

of course, if he abides by the lease, he must pay the rent. Another feature in this case, which shows that a court of law cannot give redress, is, that the plaintiff has no obligation upon the defendant for the $1,000. If the defendant chooses to pay it, he can, in a court of equity, call for the legal title; if he does not choose to do so, the plaintiff cannot compel him, but is content to keep the land, so that the relation of debtor and creditor does not exist, and there cannot well be a forbearance to sue, where there is no debt. By way of further illustration: A. informs B. that C. has a tract of land, for which he will take $1,000, and agrees that, if B. will buy the land, he will lease it at an annual rent of $100, with the privilege of buying the fee-simple when he is able to pay $1,000. B. pays C. the price and takes a deed, and leases to A. at $100. There is no usury between B. and C., for it was a purchase, nor between B. and A., for it was a lease; and yet B. is receiving 10 per cent. Vary the case by supposing that A. had contracted to buy the land from C. at $1,500, and had paid $500. Being unable to pay the balance, B., at his instance, pays it, and takes the title, giving A. a lease at an annual rent of $100, with the privilege of calling for the fee-simple, by paying B. the $1,000. B. was induced to buy for the sake of getting a safe investment at 10 per cent. This is the case we have under consideration. Consider the lease void at law for usury, the title is in B. and he has a right to possession or to rent. In a court of equity, A. can insist, that, by reason of his original contract, on the payment of the $500, he has a part of the equitable estate, and that B. holds the title in trust, to secure the payment of the $1,000, and then in trust for A. who has a right to redeem, on payment of what is *bona fide* due with legal interest. *Thorpe* v. *Ricks*, 1 Dev. & Bat. Eq., 613. A court of equity can give adequate relief; but a court of law cannot take notice of the

interest of the original purchaser, because he never had the legal estate.

We are of opinion that there was error in the court below, because that court could not take notice of the equitable estate of the defendant, but must look upon the plaintiff as the owner of the land, and, as such, he was entitled to a judgment for his rent; and the court ought to have instructed the jury, that there was no evidence to sustain the plea of usury.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

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DEN ON DEMISE OF WILLIAM WILLIAMSON v. JAMES JAMES.

An execution does not bind trust estates from the *teste*, but from the time it is "sued."

The case of *Hall* v. *Harris*, 3 Ire. Eq., 289, cited and approved.

Appeal from the Superior Court of Law of CATAWBA County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

On the trial of this action of ejectment, the following case appeared: One Lockenore, in May, 1845, conveyed in fee the premises in dispute to one E. Hetrick, in trust to sell and to pay a debt, to which one Philip Hetrick and one Sigman were his sureties. On the 22nd of October, 1845, E. Hetrick, Philip Hetrick, and the defendant, came to an agreement, by which the defendant was to pay the

trust debt, and to pay Lockenore $147 besides for his interest. Accordingly the defendant gave his note to Philip Hetrick for the amount of the trust debt, and an endorsement was made on the deed of trust in these words: "Oct. 22nd, 1845, rec'd of James James his note for $153 in full satisfaction of the within deed.

"E. HETRICK,

"PHILIP HETRICK."

On the same day, Lockenore executed to the defendant a deed for the land. At the fall term of Catawba court, which began on the 20th day of October, 1845, a judgment was taken against Lockenore, execution was afterwards issued, and the land was sold by the sheriff to the lessor of the plaintiff in March, 1846. In September, 1846, E. Hetrick, at the instance of the defendant, sold the land as trustee and executed a deed to a son of the defendant.

The plaintiff's counsel moved the court to charge, 1st. That as both the plaintiff and the defendant claimed under Lockenore, the defendant was estopped by the deed from Lockenore, 22nd October, 1845, from setting up title derived from him in any other way. And as the *teste* of the execution, under which he claimed, was prior to the date of the deed from Lockenore to the defendant, the plaintiff was entitled to recover; 2dly, that the endorsement on the deed of trust was a satisfaction of the trust debt, and left a resulting trust in Lockenore, subject to execution, and the legal estate passed to the lessor of the plaintiff by the sheriff's deed.

His Honor was of the opinion with the plaintiff, upon the first point. On the second point he charged, that, if the effect of the endorsement upon the deed of trust was to extinguish the trust debt, then Lockenore had a pure trust, liable to execution, and the plaintiff was entitled to recover. But, if the intention of the parties was not to extinguish the trust debt, but to transfer it to the defend-

ant, then Lockenore had not such a trust as was liable to execution, and the defendant was entitled to a verdict. The jury found a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

*Landers* and *Thompson*, for the plaintiff.
*Avery* and *Bynum*, for the defendant.

PEARSON, J. The plaintiff was not entitled to recover, although we do not concur in the reasoning of the judge, nor in the view he took of the case. Whether the endorsement on the deed of trust had the effect of extinguishing the trust debt, or of assigning it to the defendant, we think immaterial. It is *certain*, the legal title did not pass, but remained in E. Hetrick, the trustee. It is also *certain* that the trust estate of Lockenore did pass by his deed to the defendant on the 22nd of October, which was on Wednesday of the term, when the judgment, under which the lessor claims, was entered. The execution issued after the expiration of the term, and, at the time it issued, Lockenore had no trust estate, having passed it to the defendant by the deed of the 22nd of October, so that the lessees took nothing by the sheriff's sale. An execution does not bind trust estates from the *teste*, but from the time it is sued. *Hall* v. *Harris*, 3 Ire. Eq., 289. This does not seem to have occurred to the learned judge or the counsel. It decides the case.

PER CURIAM. Judgment affirmed.

JACOB RAMSOUR v. ROBERT THOMAS.

When the law is called upon to make the application of payments by a debtor to a creditor, who has various demands against him, and no application has been made by the parties, the application can only embrace debts, or demands for certain sums, or such as can be made certain, as accounts for work and labor, or for goods sold or the like, but not uncertain and unliquidated damages.

There is another rule in this application by the law, that it is to be first made to the debt, for which the security is the most precarious.

The cases of *Moss* v. *Adams*, 4 Ire. Eq., 42, and *State* v. *Long*, 7 Ire., 379, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This was an action of debt on the bond of the defendant, as sheriff, for the default of his deputy, in not collecting certain debts for the relators, and in collecting them and not paying over the money, and a special verdict was found, on which a judgment was rendered for the plaintiff. The special verdict was as follows: "The jury find that the defendant, Robert Thomas, was duly appointed sheriff of Henderson county, and served as such during the years 1842, 1843 and 1844, and that the bond declared on is the act and deed of the defendants duly executed and delivered for the purpose therein recited: That he appointed one J. J. Summey, in February, 1842, his lawful deputy, for and in his name to do and perform all acts, which he, the said Thomas, might lawfully do and perform as sheriff of the said county, and, by and with the consent of the said Thomas, he continued so to act as his deputy, up to the 1st of October, 1844. On the 2nd day of November, 1842,

the relators placed in the hands of the said J. J. Summey, for collection, notes on divers individuals, residing in Henderson county, which he received, and undertook to collect, in his official character of deputy sheriff, all of which were due and payable to the relators on the 27th day of October, 1842, amounting in the aggregate, when due, to $1,114.70. All of the said notes were for a less sum than $100, except one note on William Brittain and John Johnson for the sum of $566. The said J. J. Summey paid the relators, on the 28th of June, 1843, fifty dollars; on the 2d day of November, 1843, $437.43; on the 2d day of June, 1844, $100; on the 7th of July, 1844, $87; on the 25th of December, 1845, $40, and on the second day of November, 1846, $20. At no time did the said J. J. Summey, or either of the defendants, direct the relators to make any specific appropriation of the money so paid, or inform them, or either of them, upon what claim or from whom the same had been received, but the said payments were made generally for moneys received by the said J. J. Summey for the relators, upon the notes put into his hands for collection, as aforesaid. Nor had the relators, previous to the commencement of this suit, applied the same to the payment of any specific debt or note, placed in the hands of the said Summey for collection. The jury further find, that the money upon all the aforesaid notes was, or by ordinary diligence might have been, collected by the said J. J. Summey, within the official year of the said Thomas, covered by the bond declared on, and that, previous to the commencement of this suit, a demand was made by the relators on the said J. J. Summey for all the money collected by him, upon the claims or notes so placed in his hands, and no further payments were made, than those before stated. Whether the payments, made as aforesaid, ought in law to be applied, first, to the payment of the

note on William Brittain and John Johnson for $566, or upon the other notes less in amount than one hundred dollars, or, *pro rata*, upon all the notes so placed in the hands of the said Summey for collection, the jury are ignorant and pray the advice of the court. If the court be of opinion, upon the foregoing facts, that the payments made, as aforesaid, should be applied to the payment of the note of $566, then the jury find all the issues for the plaintiff and assess the relators' damages at $603.74, with interest on $529.68 from the 2d day of October, 1848, till paid; but, if the court be of opinion, that the payments made ought to be applied to the extinguishment of the notes so placed in the hands of the said Summey, for a less sum than $100 each, they find in favor of the defendants; but, if the court should be of opinion, that the payments made ought in law to be applied, *pro rata*, upon all in the hands of the said Summey for collection, as aforesaid, then they find all the issues in favor of the plaintiff, and assess the relators' damages to $293.74 and interest thereon from 2d day of October, 1848, till paid."

The court, being of opinion, upon the foregoing verdict, that the payments should be applied, first, to the extinguishment of the note of William Brittain and Johnson, so advised, and it is accordingly adjudged that the plaintiff do recover of the defendants the sum of $10,000, to be remitted upon the payment of $603.74 with interest on $529.68, from the 2d day of October, 1848, and costs, to be taxed by the clerk. From which judgment the defendants appealed.

*Baxter* and *Thomas*, for the plaintiff.

*J. W. Woodfin*, for the defendants.

RUFFIN, C. J. No judgment can be rendered on the verdict. There must necessarily be a *venire de novo*.

The application of payments by the law is only when the demands to which it is applied, are debts, or for certain sums, or such as can be rendered certain, as accounts for work and labor, or goods sold, or the like, and not for uncertain and unliquidated damages. Therefore, no more can be said here, than that the money paid ought to be applied in satisfaction of the particular debts which had been collected by the deputy sheriff, anterior to the time or times of the several payments, and that it cannot be applied to such of the claims as remain uncollected. For, in respect to the latter, the deputy did not make them his own, as upon a purchase, for not collecting them, and, therefore, he cannot be charged with the amount of them, as a debt, but he can only be made liable for the damages the plaintiff sustains by his delay and *laches*. If, however, the deputy had collected anything, on the bond of Brittain and Johnson, then, to the extent of the money so collected, the payments ought to be first applied to that demand, because it is the rule in this country to apply payments to the debt for which the security is the most precarious. *Moss* v. *Adams*, 4 Ire. Eq., 42. And that is the case with that demand, because the deputy alone is bound for that, while the sheriff and his sureties are also bound for the others. *State* v. *Long*, 7 Ire., 379. But, as the verdict does not find, that the debts were collected, but only that they were collected or might have been, no such case appears as yet, as will enable the Court to make specific applications of the sums paid; but the case must go to another jury.

PER CURIAM. Judgment reversed and *venire de novo*.

JAMES WEARE, et al. v. JOHN BURGE, et al.

An action of trover does not abate by the death of the party doing the wrong, under the Rev. Stat., ch. 2, sec. 10.

In actions of contract, the parties must all join in the action, or advantage may be taken of the non-joinder on the general issue; but, in actions of tort, the non-joinder must be pleaded in abatement.

Where only one, of several tenants in common of a negro, sues in tort, the statute of limitations cannot operate upon him, though it might against all, if his co-tenants, against whom it was available, joined in this action. *Quere*, how would it be, if the objection had been taken by a special plea?

The case of *Montgomery* v. *Wynns*, 4 Dev. and Bat., 527, cited and approved.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

The plaintiffs, jointly with four other persons, were the owners of the slaves sued for, by gift from their grandfather, Robert Webb, the testator of the defendants. At the time of the gift, all the donees were infants. The action is in trover for an alleged conversion by the testator. In order to show the conversion, it was proved, that the donor came to the house of the mother of the plaintiffs, who was his daughter, and told her that she must give up to her brother, Elisha Webb, who was present, the negroes in controversy, or he would not convey to her a title for a tract of land she had purchased of him. And, a few hours after, a slave, by the name of Peter, went to the house of Mrs. Weare, with a wagon and team, all of which had before that time belonged to Robert Weare, and carried off the negroes, without the leave of Mrs. Weare. At the time the action was brought, the right of action of all the donees was barred by the statute of limitations, except that of

the plaintiffs. The defendants objected to the plaintiffs' recovery, on four grounds: 1st. That trover would not lie. 2nd. That two of the six donees could not maintain the suit; the other four ought to be joined. 3rdly. That, part being barred by the statute of limitations, all were barred; and 4thly. That there was no conversion. His Honor ruled the first three objections against the defendants, and left the question of the conversion to the jury, as one of fact, after instructing them as to the law on the subject. The jury found that there was a conversion. And from the judgment thereon the defendants appealed.

*Baxter*, for the plaintiffs.
*Bynum* and *Gaither*, for the defendants.

NASH, J. We see no error committed by his Honor. On behalf of the defendants it is contended, that the plaintiffs had neither the title to the slaves sued for, nor the possession. The case states, that the gift by Robert Webb was to the plaintiffs and other children, and the negroes being taken from their mother, with whom they lived, being infants, were taken from them—her possession being their possession. The title was, therefore, in them, and they were entitled to the present possession. The defendants are answerable in this action for a conversion by their testator. The action of trover is one of those enumerated in the 10th sec. of the 2nd ch. of the Revised Statutes, as not abating by the death of the person, converting the property. The first objection is untenable. The second is equally so. In actions upon a contract, all who are entitled to sue for its violation, must be made parties plaintiffs, and the non-joinder of any may be taken advantage of, on the general issue. But in actions *ex delicto*, if any person is omitted, who ought to be made a party plaintiff, the defect must be brought to the

notice of the court, by a plea in abatement, 1 Ch. Pl., 60; and the defendant cannot avail himself of the objection in any other mode, although it appear on the face of the declaration. 1 Saund, 201. In such a case the defendant may avail himself of the omission, by an apportionment of the damages on the trial. 1 Ch. Pl., 66. The 3rd objection is, as to the operation of the statute of limitations. It is urged that, when the statute has begun to run, nothing stops it, and as the donees, who have not sued, are barred, that these plaintiffs, having the same title to the negroes, are also barred. It will be recollected, that the statute, which is relied on, bars the remedy only and not the right. If the persons omitted had been joined, it would have been a joint action, and the statute being a bar to a portion of the plaintiffs, would have been a bar to that action. 7th Cranch, 154; *Montgomery and Wynns*, 4 Dev. & Bat., 527. What would have been the effect of a plea in this case, we are not called on to decide. The defendants did not avail themselves of it, and went to trial, as if the plaintiffs were the only persons, who ought to have sued, and cannot in this action avail themselves of the disability of persons, who are not parties to the action.

The 4th objection cannot avail the defendants. The evidence of a conversion by the testator, Webb, was slight, it is true, but we cannot say there was none. He went with Elisha Webb, his son, to Mrs. Weare, and told her she must give up the negroes to Elisha, or he would not make her a title to certain land, which he had sold her. In a few hours thereafter, the negroes were carried off by a negro man in a wagon, and the negro and wagon and horse all had before that time belonged to the testator. There was, then, evidence to go the jury, and the question was fairly and fully left to them, and they have found that the testator had converted them.

PER CURIAM. Judgment affirmed.

THE STATE on the relation of BENJAMIN BUBCH and wife v. NATHAN CLARK, et al.

An action upon the administration bond of an administrator, for a distributive share belonging to a married woman, must be brought on the relation of the husband and wife, though the husband may have assigned his wife's share to a third person.

The cases of *Wright* v. *Lowe*, 2 Murph., 316, and of *Dozier* v. *Muse*, 2 Haw, 482, cited and approved.

Appeal from the Superior Court of Law of CALDWELL County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of debt, upon the administration bond of the defendant and his sureties, to recover the distributive share of the intestate's estate. The wife of Benjamin Burch, one of the relators of the plaintiff, was a distributee of Mabel Clark, and entitled to one-seventh part of the said estate. The evidence was, that Benjamin Burch, the husband, sold his wife's share in the estate of Mabel Clark to the witness introduced; that, not paying for it, he sold it to Robert Smith, and he, Robert, agreed to pay Benjamin Burch the amount the witness agreed to pay. The jury found a verdict for the plaintiff, and the sole question is, whether the suit is properly brought upon the relation of Benjamin Burch and wife Mary, to the use of Robert Smith, who was the assignee of Benjamin's interest in the said estate.

The court, being of opinion with the plaintiff, gave judgment accordingly, and the defendants appealed to the Supreme Court.

*Guion*, for the plaintiff.
*Gaither*, for the defendants.

NASH, J. The only question is, whether the action was properly brought. The *feme* relator is one of the next of kin to Mabel Clark, and entitled to a distributive share of her estate. She and her husband assigned their interest to one John Smith, and the action is brought on their relation to the use of Smith, on the administration bond, against the administrator and his sureties. On the part of the defendants, it is alleged the action ought to have been brought on the relation of Smith. We agree with the court below, that it is properly brought. To sustain the defense, several cases have been referred to; none of them we think have that effect. In *Wright* v. *Lowe*, 2 Murph., 236, the petition was filed in the county court, and the objection was to the jurisdiction. The decision is, that the county court had jurisdiction, and that the purchaser of a distributive share may file a petition in his own name, it being in the nature of a suit in equity. The case of *Dozier* v. *Muse*, 2 Hawk., 482, was in equity, and decided, that, though a distributive share of a *feme covert* in property, not divided, could not be levied on at law, the husband might assign it, so as to bind the wife. The action in this case is at law, and the question is, as to the legal rights of the parties. The legal title being in the relators, and not assignable at law, they are properly made parties. In equity, when the assignment by the husband of the wife's chose in action is absolute and unconditional, leaving in the assignor no liability, the assignee *may* sue without making the assignor a party. *Thompson* v. *McDaniel*, 2 Dev. & Bat. Eq., 463. But if any interest remain in the assignor, he must be a party. We think, therefore, that the action was properly brought, and that it is not affected by the death of the husband, but survived to the wife. *Hardie and Cotton*, 1 Ire. Eq., 61.

PER CURIAM. Judgment affirmed.

JOHN P. HOUSTON v. HUGH G. PORTER, et. al.

An attachment issued by a justice out of court, and not made returnable within thirty days, is void.

A garnishee has a right to object, that the attachment under which he is summoned is void, and that therefore no judgment should be rendered against him.

The cases of *Clark* v. *Quinn*, 5 Ire., 179, and *Washington* v. *Saunders*, 2 Dev., 346 cited and approved.

Appeal from the Superior Court of Law of UNION County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This was a proceeding by attachment, issued by a justice of the peace out of court, at the instance of the plaintiff, against one Hugh G. Porter, one of the defendants, for the sum of about seventy-six dollars, and the other defendant, David Moore, was summoned as garnishee, and filed his garnishment. The attachment was not made returnable before any justice or within thirty days after its *teste*. A conditional judgment was taken against Porter by default. Moore resisted a motion for a judgment upon his garnishment, on the ground that the writ of attachment was void. The court having sustained this objection and directed the proceedings to be dismissed at the plaintiff's costs, the plaintiff appealed.

*Bynum*, *Wilson* and *Alexander*, for the plaintiff.

*Thompson*, for the defendants.

NASH, J. By the 6th ch., Rev. Stat., sec., 13, power is given to a single magistrate out of court to issue an attach-

ment, in all cases where by the law he has jurisdiction of the sum demanded, and it directs that it shall be made returnable before some justice on or before thirty days after the date thereof. In this case the attachment is defective and void. After directing the officer to attach so much of the defendant's property, as may be sufficient to satisfy the plaintiff's debt, the writ proceeds: "and such estate so attached in your hands to secure or so provide, that the same may be liable to further proceedings thereupon, to be had in relation thereto, according to law, so as to compel the said Hugh G. Porter to appear and answer to the above complaint, when and where you shall make known how you have executed this attachment." The attachment is not returnable on any particular day, nor before any justice or court, nor within thirty days after its *teste*. It is an absolute nullity. It is an original process without any return day. To this effect is the case of *Clark* v. *Quinn*, 5 Ire., 176, and, likewise, the case which preceded it, of *Washington* v. *Saunders*, 2 Dev., 346. The latter was decided upon common law principles. Both at common law and under the statute, the attachment in this case is void; none of the defects being of a nature to be cured by the appearance of the defendant. As the attachment is void, a judgment on it would not protect the garnishee against his creditor, and he has therefore a right to make the objection.

PER CURIAM. Judgment affirmed.

PETER BALLEW, Adm'r. &c. v. ABRAHAM SUDDERTH.

A. purchased a mare from B. and gave his note for the price. At the bottom of the note the following was appended: "It is agreed and understood, that a sorrel mare, for which the above note is given, is to remain the property of B. until the above note is fully paid." A., without having paid the note, sold the mare to C.; *Held*, that A. had no right to sell and his vendee acquired no title.

The case of *Gaither* v. *Teague*, 4 Ire., 65, cited and approved.

Appeal from the Superior Court of Law of CALDWELL County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of trover for the conversion of a sorrel mare. The plaintiff gave in evidence a promissory note of one Andrew Cline for sixty dollars, dated March, 1845, and payable in carpenter's work, underneath which note the following was written: "It is agreed and understood, that a sorrel mare, for which the above note is given, is to remain the property of P. Ballew until said note is fully paid." Signed by the plaintiff's intestate and the said Cline. The note has an endorsement of the payment of $11.50. The agreement was proved in the county court of Caldwell and registered.

W. C. Loudermilk, the witness to the note and contract, was introduced as a witness on the trial by the plaintiff. He stated that he, Ballew and Cline, were together, that Ballew agreed to sell to Cline a sorrel mare, which he, Ballew, was then riding, for sixty dollars; that Cline was to give his note for the amount agreed upon, payable in carpenter's work, and upon a credit of six months; that Cline agreed to purchase the mare and was to give his note when they got to the next house; that, before they

got to the house, Cline said he was indebted to one Warlick, and that he had rather Ballew should retain the title, to prevent the mare being sold by this creditor; that Ballew said nothing; that, when they got to the house, the note and paper writing above set forth were executed by them, that there was no delivery of the mare at this time, but shortly afterwards he saw the mare in the possession of Cline. The witness also stated, that Ballew was to employ a carpenter to superintend the work, and Cline was to work under him. It was furthermore in proof, that Cline sold the horse to the defendant in November or December, 1845, for twenty dollars, and that the plaintiff demanded the horse of the defendant, before suit was brought, and he refused to deliver him.

The defendant introduced a witness, who stated, that he heard Cline tell Peter Ballew, that he had some work on hand at that time, that he should finish it in a few days and he would then be ready for his work that Ballew replied, very well, he was getting his lumber, and would by and by get ready. Another witness also stated, that Cline worked with him, that he commenced work in June, 1845, and that Ballew came to his house and mentioned to him, that Cline owed him some money, and wanted to know if he could get anything out of him; that Cline was to work for him, but he was not ready for him at that time; that in February, 1846, Cline went off to Georgia and remained about six weeks; that after his return he saw Ballew, who stated that Cline owed him, and that he wished him, the witness, to employ Cline and retain his wages for him, Ballew; that it would prevent a difficulty with the witness' brother, the present defendant, who had purchased the mare from Cline; that Cline had been to see him for the purpose of working and that he was not ready for him. Witness further stated, that, some short time before this suit was brought, Cline left the country and went to Mexico, and has not returned.

The court charged the jury, that the sale of the mare to Cline, as evidenced by the writing, was a conditional one, and not a mortgage; that it required no registration; that the title remained in the plaintiff, and was in him, at the time of the sale to the defendant; that there was evidence, that Cline was ready to do the plaintiff's work, but at what time he was ready did not appear; and it was also in evidence, that the plaintiff was not prepared to give him work, when he, Cline, wished it; but that, if they should believe all the the testimony offered by the defendant, it would be no defense to this action; that, if the defendant had proved, that he was ready to do the work on the 30th of September, 1845, when the note was due, and continued so until the bringing of this suit, it would be no defense. The defendant's counsel then requested the court to instruct the jury, that "if the jury believed, from what was said and done at the time of the contract, and from his acts and declarations, that the plaintiff's intestate did not intend to rely on a lien on the horse, as a security for his debt, and his acts and declarations were such, as were calculated to raise such a belief generally, then the plaintiff ought not to recover;" and further, "if Cline procured the condition to be annexed to the contract, to delay or hinder Warlick or any other creditor from the collection of his debt, and the plaintiff's intestate acquiesced in this purpose of Cline, and, at his suggestion, agreed that the condition should be annexed, and had no wish to retain any property in the horse, as security for his debt, then the condition, as to creditors and purchasers, was void, and the plaintiff had no right to recover." The court declined to give the instructions prayed for

The jury, under the instructions of the court, found a verdict for the plaintiff, and from the judgment thereon, the defendant appealed.

*Gaither*, for the plaintiff.
*Guion*, for the defendant.

PEARSON, J. In the case of *Gaither* v. *Teague*, 4 Ire., 65, the bill of sale, like the one in this case, was upon a condition precedent. The decision in that case assumes, that the property remained in the vendor, and he would be entitled to recover, unless the price had been paid. It is the misfortune of the defendant that Cline, his vendor, has not paid for the horse, so as to vest the title by a performance of the condition. We concur with his Honor, that the bill of sale was not a mortgage, but a sale, to take effect if the price was paid. There is no statute requiring such bills of sale to be registered. Should the practice of making such bills of sale become common, how far the evil of allowing an intended vendee to have possession and thereby acquire a false credit, while the vendor retains the title, will require legislative interference, and may be a matter for the consideration of the general assembly. Our duty is to declare the law, not to make it. Admit that, in this case, the suggestion of allowing the title to remain with the plaintiff's intestate was made by Cline, for the purpose of defrauding his creditors and preventing them from having the mare levied upon and sold for his debts, and that the defendant afterwards, *bona fide*, bought the mare from Cline, it cannot avail the defendant, because, as Cline had no vested right of property, the defendant could acquire none from him. The statutes of 13th and 27th Elizabeth have no application to cases like the present. Those statutes apply to cases where one has the right of property and transfers it, with the intent to defraud creditors and purchasers. The transfer is declared void and the property remains his, subject to the rights of creditors and purchasers. When one has not the right of property,

to declare a transfer by him to be void, would be absurd, and it would be equally so to declare the transfer to him to be void. For instance, in this case, if the bill of sale by the plaintiff's intestate to Cline be declared void, because of the intent to deceive creditors, the title would still remain in the intestate as the plaintiff now alleges. The remedy would be to provide exactly the reverse, that is, that the transfer shall be valid, and pass the title with the possession.

PER CURIAM. Judgment affirmed.

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DOE ON DEMISE OF WILLIAM HARVEN and Wife v. T. B. SPRINGS.

It is sufficient evidence of the probate of a will to pass real estate, that it is certified by the clerk that "it was proved in open court by H. G., a subscribing witness, and recorded," when it appears on the face of the paper, that there were two subscribing witnesses.

The cases of *University* v. *Blount*, N. C. T. R., 13, and *Morgan* v. *Bass*, 3 Ire., 243, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Special Term in July, 1849, his Honor, Judge *Baily*, presiding.

On the trial of this action in ejectment, the defendants were proved to be in possession of the premises, set forth in the declaration. The plaintiff's lessors claimed the lands, as sole heirs of one Thomas Kendrick, and, to make out their case, they offered to read in evidence a copy of the last will and testament of one John Kendrick, deceased, in which a portion of the land described in the

declaration was devised to Green Kendrick, another portion to Thomas Kendrick, and the residue to his widow. The defendant objected to the reading of the said will, because it was not duly certified; secondly, because it did not appear, that it had ever been proved as a will to pass real estate. The certificate of the clerk was as follows: "The last will and testament of John Kendrick, deceased, was proved in court by Henry H. Glover, a subscribing witness, and recorded." Two other names appeared on the paper, as the names of subscribing witnesses. The court overruled the objection, and permitted the will to be read. The plaintiff then read a copy of a deed in trust, made by Thomas Kendrick, in April, 1829, to one James Dinkins. The bargainor in the said deed was the immediate ancestor of the *feme* lessor of the plaintiff, which deed covered the lands embraced in the plaintiff's declaration, besides some negroes. The plaintiff then, with the view of shewing that the defendant claimed title to the property in controversy under Thomas Kendrick, introduced one Smith, who swore that he heard a conversation between one Lewis Dinkins, the executor of James Dinkins, the trustee, and S. Fox, the administrator of Thomas Kendrick, and R. J. Dinkins, the *cestui que trust*, in which conversation it was agreed by R. J. Dinkins, that the executor of the trustee might surrender the negroes to the administrator of Kendrick, if he could get the land; and he also proved, that he heard R. J. Dinkins say, that he had purchased from the widow of Thomas Kendrick her dower estate in the land, at the price of $600, which testimony was objected to and the objection overruled by his Honor. The plaintiff read copies of deeds, after objections, from R. J. Dinkins to one B. Persons and from B. Persons to Eli Springs, the husband of the defendant T. B. Springs. It appeared from the testimony of the plaintiff, that one hundred and six acres of the land sued for had belonged to one Osborne,

and that his daughter and her husband, while she was a married woman, had conveyed the land to the *feme* plaintiff, without any privy examination, and that she and her husband had been dead for five years, so that the lessors of the plaintiff had no title to this portion of the land; but the plaintiff insisted, if the jury were satisfied, from the testimony of Smith, that R. J. Dinkins claimed the land under the trust deed, the plaintiff was entitled to recover the whole of the land described in the declaration. And his Honor instructed the jury that, if they were satisfied from the testimony of Smith, that Dinkins claimed all the land sued for, under the trust deed to James Dinkins, the plaintiff was entitled to recover all the land described in his declaration. The judge was requested to charge the jury, that the plaintiff was not entitled to recover the 106 acres, conveyed by the husband and wife, for the reason that, according to the plaintiff, the lessors had no title; which charge the court refused to give. A verdict was returned for the plaintiff for all the lands described in the declaration. From the judgment upon this verdict the defendant appealed.

*Thompson*, *Bynum* and *Alexander*, for the plaintiff.
*Boyden* and *Wilson*, for the defendant.

NASH, J. We think his Honor erred in his instruction to the jury, and there must be a *venire de novo*. On the trial, a copy of the will of Thomas Kendrick, the father of the *feme* lessor of the plaintiff, was offered in evidence, and opposed, upon the ground that it did not appear from the clerk's certificate, that it had been proved as a will to pass real estate. The will is attested by three witnesses, and the clerk certifies "that it was proved in open court by Henry H. Glover, a subscribing witness, and recorded." The alleged objection is, that the clerk has not certified, that the witness proved the will, as required

by law to pass real estate. It is believed the probate is sufficient to pass the real estate, and, that it does so, sufficiently appears by the certificate.

The objection was first brought to the notice of the court in the case of *The University* v. *Blount*, N. C. T. R., 13. In that case, the clerk's certificate was as in this, and the objection the same. The decision was, that it is not essential, that the clerk's certificate should set out all the circumstances necessary to the validity of the will to pass real estate. When it appears on the face of the will, that there were two witnesses, and the clerk certifies that it was proved by one, the proof must *prima facie* be intended to have been such as the law requires, that is that the witness deposed, that he and the other witness subscribed the will in the presence of the testator, because the law requires such an attestation and such proof, and, without it, the court would not admit it to probate. That case was referred to and approved of in a more recent one of *Morgan* v. *Bass*, 3 Ire., 243. The certificate of the clerk there, as in this case, as to the proof of the will, so as to pass real estate, was sufficient—and the court committed no error in admitting the evidence. We express this opinion, not because it is necessary to the decision of the question properly submitted to us, but because, as the case must go back to another jury, our silence upon it might be misunderstood and the investigation embarrassed by it. The plaintiff is not entitled to a verdict. He shewed no legal title to the land in his lessor. No grant was produced, and, as far as the case discloses the facts, the title is still in the state. To remedy this defect, he alleges, that the defendant claimed the land, under a deed of trust, made by Thomas Kendrick, the father of the *feme* lessor. It appeared, that Thomas Kendrick claimed the land and conveyed it in trust to one James Dinkins, to secure a debt due to one Robert J. Dinkins, and the plaintiff proved by a witness,

named Smith, that he heard a conversation between Lewis Dinkins, S. Fox and R. J. Dinkins, in which it was agreed, that the executor might surrender the negroes to the administrators, if he, Robert J. Dinkins, could get the land. At the time this conversation took place, Thomas Kendrick and James Dinkins were both dead. Lewis Dinkins was the executor of the trustee, and S. Fox the administrator of the bargainor. Smith further proved, that he heard Robert J. Dinkins say, he had purchased, of the widow of Thomas Kendrick, her right of dower in the land in question. The reception of all this testimony was opposed, but the objection, were overruled. A regular paper title was shewn by the plaintiff, from Robert J. Dinkins, to the defendant. His Honor instructed the jury, that, if, from the testimony of Smith, they believed that Robert J. Dinkins claimed the land in controversy under the deed of trust, the plaintiff was entitled to recover all the land described in his declaration. On looking into the deed of trust, it appears that it conveyed to James Dinkins, the trustee, only a life estate, without any provision for its continuance after his death. At the time the conversation, testified to by Smith, took place, both James Dinkins and Thomas Kendrick were dead. The legal title had reverted back to the heir at law of Thomas Kendrick, who was the *feme* lessor of the plaintiff, she being his only child. The deed of trust was *functus officio*, a dead letter; and Robert Dinkins could not claim under it. Nor is there any evidence, that he ever was in the possession of the land or any portion of it. His declaration was, if he could get the land, the executor of the trustee might give up to the administrator of the bargainor the negroes conveyed by it. Nor was there any proof, what had become of the negroes. There was in fact nothing for an estoppel to operate on. Estoppels are not favored in law, particularly such as arise from the acts of the party; as their effect is to exclude the truth. The

plaintiff, having entirely failed to show, that the defendant claimed through Robert J. Dinkins under the deed of trust, and having produced no sufficient evidence of a legal title in his lessors, was not entitled to a verdict. The exception to the *mesne* conveyan es was withdrawn in the argument before us.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

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DOE ON DEMISE OF JOHN MOFFIT, et al. v. JOSHUA WITHERSPOON.

Where the lessors of the plaintiff claimed as the heirs-at-law of one A. D., who was dead; *Held*, that the declarations of the said A. D. that the said lessors were the children of a married sister, deceased, and were her nearest living relations, were admissible in evidence, to prove the fact of such relationship.

Such declarations are competent to prove marriages as well as births.

The declarations of counsel on the trial of a cause, as to matters of fact, are not evidence against one, who was managing the suit as agent for the client, even if they could be against the client himself;

*Held*, that it was error in a judge to instruct the jury, when the enquiry was as to the mental capacity of a party, that "it was not sufficient that she should be able, merely to answer familiar questions, but to manage her business with judgment and discernment." It is sufficient, if the person understood what he was about.

The case of *Armstrong* v. *Short*, 1 Haw., 11, cited and approved.

Appeal from the Superior Court of Law of IREDELL County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This was an action of ejectment begun in 1838. The lessors of the plaintiff claimed title to the premises in question, as the heirs-at-law of Ann Donahoe, who according to the proof, died in 1832, unmarried and childless. The plaintiff exhibited in evidence a grant from the state to the said Donahoe for the land in dispute, dated in 1780, and countersigned by John Shepherd, with the addition *pr. sec.* The defendant objected to the reading of the grant, upon the ground that it did not appear to have been duly countersigned by the secretary of state. The court overruled the objection and the grant was read. To prove that the lessors of the plaintiff were the sole and proper heirs-at-law of Ann Donahoe, a witness was introduced, who swore, that, 25 or 26 years ago, or perhaps a little more, he heard the said Ann Donahoe say, then a very old woman, when on a visit to the lessors of the plaintiff, that they were the nearest relations she had living, and that they were the children of her sister, who was long since dead, and who had many years before married one Whitaker, the father of the said lessors; that the said lessors lived in the county of McDowell, then Burke. Mrs. Wellborne, a witness for the defendant, swore, that, on one occasion, the said Donahoe came to her husband's to get him to write her will, as she desired to leave her property to strangers, in order that it might not descend to her *relations in Burke.* The defendant claimed title to some lands from the said Donohoe, under several deeds offered in evidence, and executed by her in 1828, 1830 and 1831, and covering the premises in question. The plaintiff insisted, that the said deeds were void, for want of mental capacity in the said Donahoe at the time to execute the same, and, to establish this fact, introduced much testimony, and, among other things, offered to prove by Col. Adolphus Erwin, that he was present in Wilkes court, in 1823, when a suit was tried, in which one Howard was plaintiff, and the said Ann Dona-

hoe defendant; that this defendant acted as the agent of the said Donahoe, and employed the Hon. D. F. Caldwell as counsel, and offered to prove, and through his counsel insisted, that the said Donahoe was incompetent from old age to make a contract, and, upon that occasion, set up the incapacity of the said Donahoe, as a matter of defense. The defendant objected to this testimony, upon the ground, 1st, for the want of a transcript of a record of the said suit; 2nd, that the defendant ought not to be affected by the declarations and acts of his counsel, and particularly, as he was only the agent of the said Donahoe in the management of the said suit. The court decided, that it would be improper to speak of the detailed occurrences of the said suit, without producing a copy of the record, and that even a copy of the record could not be read by way of concluding the defendant in this action, but that the plaintiff might give evidence of the acts and declarations of the defendant, and also the declarations of his counsel in his presence, as to matters of fact, which declarations the jury might weigh at their discretion. Col. Erwin then proceeded, and stated that the defendant was present, in the hearing of his counsel in Wilkes, and that his counsel declared and argued to the jury, that the said Donahoe, from old age, was *non compos mentis;* that the defendant acted at the time as agent for the said Donahoe, and employed the said counsel, and was silent when these declarations were made. The plaintiff then offered to read the deposition, of a witness, taken *de bene esse*, who was since dead, which deposition was taken in pursuance of a commission issued by the clerk, in vacation, on the application of the plaintiff. The defendant's counsel objected to the reading of the deposition, upon the ground, that it was not taken in pursuance to the act of assembly. The plaintiff's counsel then read the following general rule, entered at the Fall Term, 1827, of this Court: "Ordered,

by consent of the lawyers attending this court, that commissions to take depositions be issued by the clerk of the court, on application to him, as other process." The defendant's counsel still objected, and argued that the case did not fall within the said rule. The court entertained the opinion, that it was governed by the rule, but remarked that the rule itself was not law, but only a conventional agreement between the attorneys of this Court, and that, if the defendant's counsel insisted upon it, he would disregard the rule and administer the law as understood by the court. The defendant's counsel replied that they waived nothing. The court rejected the deposition. The defendant's counsel, to prove the sanity of the said Donahoe, at the time of making the said deed, offered to read the deposition of two witnesses, residents of the *State of Georgia*, and taken in pursuance of a commission issued by the clerk of this Court in vacation and on the application of the defendant. The plaintiff's counsel objected to the reading of the deposition, upon the ground, that the commission issued without any special order of court to that effect. The defendant's counsel contended, that there was no proof, that the lessors of the plaintiff were the legitimate children of the said Donahoe's sister, and that it was not in evidence, that she was ever lawfully married to the said Whitaker. The court instructed the jury, that, if they believed the lessors were the children of said Donahoe's sister and recognized by her as relatives, then the law presumed them legitimate, until the contrary appeared, and left it to them to say, from all the testimony, whether or not the lessors of the plaintiff were the heirs-at-law of Ann Donahoe. The court further charged the jury that the law presumed the said Donahoe capable of making the said deed, unless the evidence satisfied them to the contrary, and that, in judging of the sufficiency of her intellect, it was not merely necessary that she should be able to answer familiar questions, but to manage her business with judgment

and discernment. The jury returned a verdict for the plaintiff. Rule for a new trial granted. Rule discharged and judgment of the court; from which the defendant appealed to the Supreme Court.

*Boyden* and *Alexander*, for the plaintiff.

*Osborne*, *Bynum*, *Avery* and *Guion*, for the defendant.

NASH, J. This is an action of ejectment. The lessors of the plaintiff claim the land in controversy, as the heirs-at-law of Ann Donahoe, and the defendant claims title under her also. It is, therefore, unnecessary to decide the question, as to the sufficiency of the certificate upon the grant to her. Both parties are estopped to deny title in her. The declarations of Ann Donahoe were properly admitted, to prove the pedigree of the lessors of the plaintiff. In such questions it is often impossible to prove the relationship of past generations by living witnesses, and resort must be had to declarations, made by those now dead, who were likely to know the facts. Ann Donahoe, who is dead and under whom the defendant claims title, who was at the time a very old woman, declared that the lessors of the plaintiff were the children of her sister, who was married to one Whitaker, both of whom died many years ago, and that they were her nearest relations. The question is not as to the sufficiency, but as to the competence of the testimony. Ann Donahoe, as she states, was the sister of Whitaker's wife, contemporaneous with her, and the lessors of the plaintiff were the issue of that marriage. These are not mere wanton declarations—they were made to the lessors themselves, when pointing out the connection between them and the said Ann, and, in all probability, her heirs. Were these declarations of Mrs. Donahoe evidence proper to go to the jury of the fact of the marriage of Whitaker and her sister? We think they were. A marriage is proved, either by showing an actual

marriage, or by proof of reputation or cohabitation of the parties. The usual evidence under the first in this state is by some person, who was present at the ceremony. Under the 2nd, declarations of deceased members of a family, 3 Stark. on Evi., 4th part, 939; 1st vol., do, 58, 59. But the declarations here went further than mere reputation. Mrs. Donahoe speaks of what she declares she knew to be the fact, that the lessors of the plaintiff were the children of her sister and born in wedlock. If so, the law presumes them to be legitimate, until the contrary is shewn. 2 vol. Stark. on Evidence, 217, p. 4. Such a declaration is not only evidence of pedigree, but also of the state of the family, as regards the relationship of its different members. 1 Star., 95. In this case, it was not only as to the legitimacy of the lessors of the plaintiff, but also that they were her nearest living relations. The word relation is the same as kindred or consanguinity. Mrs. Whitaker was the sister of Mrs. Donahoe, who was the first purchaser of the land in question, and her collateral relations, and, upon her death without issue, was her heir or one of her heirs, and, upon the death of Mrs. Whitaker, her children stood in her place and succeeded to the inheritance of Mrs. Donahoe's estate, exclusive of those more distantly related. 2 Ch. Blk., 204. The declarations of Mrs. Donahoe showed, that such was the fact, if believed, and entirely rebutted the idea, that there was any person or persons, who stood between them and the succession. It was then evidence to go to the jury of these facts, and his Honor committed no error in admitting it. However small the weight might be, its admissibility seems to rest on clear legal principles. We think his Honor erred in admitting the testimony of Mr. Erwin, as to the declarations of the counsel of Mrs. Donahoe, made on the trial of the suit of Howard against her. The present defendant was the agent of Mrs. Donahoe in the management of that suit, and the declarations given in evidence were

those of the counsel, made in his argument to the jury. His Honor held that the plaintiff might give evidence of the acts and declarations of the defendant, and also the declarations of his counsel in his presence, as to matters of fact, which declarations the jury might weigh at their discretion. No fault can be found with the first part of his opinion. We cannot concur in the latter. In the first place, the counsel, whose declarations were given in evidence, was not the counsel of the defendant. To hold him bound by all the declarations, made by the counsel of his principal in the argument of the case, would be carrying his liability, as agent, farther than any principle of law, we are acquainted with, would justify. It would be carrying the doctrine very far to say, that a party to a suit was bound by declarations of counsel, made in his argument to the jury, though made in his presence.

His Honor committed no error in rejecting the deposition offered in evidence by the plaintiff. It being taken *de bene esse*, it did not come within the rule, under which it was taken. He erred in rejecting the deposition, offered by the defendant; this being taken under the general order, established by the court; the other requiring a special order, which had not been obtained. We do not agree with his Honor in his declarations to the jury, upon the mental capacity of Ann Donahoe, as to the rule by which they were to ascertain the fact. He charged that Ann Donahoe was deemed in law capable of making a contract until the contrary was proved. This is correct, so far as this case is concerned, He then proceeds, in judging of the sufficiency of her intellect, "it was not sufficient that she should be able, merely, to answer familiar questions, but to manage her business, with judgment and discernment." We do not consider the rule so laid down to be correct. If all persons are to be judged incapable of making contracts, who do not manage their business "with judgment and discernment," we apprehend there are many more

disqualified by law than are now considered so. We know no better rule upon this subject, than that laid down by Lord COKE, that the person must be able to understand what he is about. To the same effect is the language of Chief Justice TAYLOR in the case of *Armstrong and Arrington against Short*, 1 Haw., 11. The rule laid down by his Honor was too broad, and well calculated to mislead the jury.

PEARSON, J. The declarations of Ann Donahoe were clearly admissible, to prove the relationship of the lessors of the plaintiff to her. The declarations of a deceased member of a family are admitted, as evidence in matters of pedigree, using the word in its largest sense, so as to include marriages and births; for two reasons, it is a matter supposed to be within their knowledge; it is a matter about which they are presumed to be particularly interested to ascertain and declare the truth. Every one, from a feeling of nature, endeavors to know, who his relations are, and will seldom declare those to be his kinsmen who are not. Matters of pedigree are difficult of proof, and, after one generation has passed, can rarely be established by better evidence. Declarations of deceased members of a family are received, as the best evidence the nature of the case admits, and as tending, most usually, to establish the truth. In this case, besides the above rule of evidence, the declarations of Ann Donahoe are admissible, upon the ground, that both of the parties claim under her; the lessors of the plaintiff as her alleged heirs, and the defendant as her alleged donee.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

ZACHARIAH CABE v. FRANKLIN JAMESON.

Where a certain duty arises under a sealed instrument, merely accord and satisfaction by parol is no sufficient answer, for a deed ought to be avoided by a matter of as high a nature.

But where the covenant sounds altogether in damages, though secured by a penalty, accord and satisfaction executed, though in parol, is a good defense.

The case of the *State* v. *Cordon*, 8 Ire., 179, cited and approved.

Appeal from the Superior Court of Law of MACON County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This is an action of debt on a convenant. The case is as follows: The intestate, Douglass, contracted by deed to purchase from the plaintiff a tract of land, at the price of $1,500. The covenant is executed by both parties, and each is bound to the other in the penal sum of $3,000. The vendor is bound to make title, when the purchase-money is paid, and the vendee to pay the money in the year 1846, if put into possession in that year. The words of the latter covenant are, "the consideration of $1,500 to be paid to said Cabe, when said Douglass should be put in full possession of the land contracted for." The breach assigned in the declaration is, that the intestate did not, during the year 1846, pay the price stipulated in the condition of the bond; the damages demanded are for the failure so to do. Several pleas were entered by the defendant. The only one relied on is, that of accord and satisfaction. It was admitted, that the intestate had

declared his inability to perform his contract, but the defendant alleges, that when called on by the plaintiff to do so, the parties had entered into a new contract, to-wit: that the intestate proposed to the plaintiff to pay him one hundred dollars on account of his disappointment, which the plaintiff accepted, as a satisfaction. On the part of the plaintiff, it is contended, that, as the intestate's obligation was under seal, it could not be discharged by an accord and satisfaction, entered into by parol, and that therefore the testimony was improperly received. The testimony was received, and the jury instructed, that, if they believed it, they should find for the defendant.

There was a verdict for the defendant, and the plaintiff appealed.

*N. W. Woodfin* and *J. W. Woodfin*, for the plaintiff.
*Gaither*, for the defendant.

NASH, J. As a general proposition it is true, that where a certain duty arises under a sealed instrument, merely accord and satisfaction by parol is no sufficient answer, for a deed ought to be avoided by a matter of as high a nature. 6th Coke, 44, *Blake's* case. As in an action of debt upon a single bill, for the payment of money only, for there the debt is ascertained. *Preston* v. *Christmass*, 1 Wil., 88. But when the covenant sounds altogether in damages, though secured by a penalty, accord and satisfaction executed though in parol, is a good defense. This doctrine is clearly established by the case of the *State* v. *Cordon*, 8 Ire., 179. There the action was in debt on a guardian bond, and satisfaction pleaded. Upon settling his accounts, the guardian fell largely in debt to his ward, the relator, and, in satisfaction, transferred, by assignment to him, several promissory notes on third persons, which were accepted in satisfaction of the balance. This Court decided that the suit was substantially for

damages, that the duty did not accrue to the relator in certainty by the bond, but from a wrong or default subsequent, which gave him his action to recover damages from the defendant, and consequently a plea of satisfaction of those damages is good. This case covers the whole ground, taken on the defense.

PER CURIAM. Judgment affirmed.

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NEIL, BROWN & WILLIAMS v. L. D. CHILDS & CO.

A party does not make one his witness by taking his deposition, which he declines to read, or by having him subpœnaed, and then declining to examine him.

All contracts are several, although made by partners.

The case of *Jones* v. *Ross*, 2 Car. Law Rep., 450, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Special Term in July, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of assumpsit, brought by the plaintiffs, as partners, under the style of Neil, Brown & Williams, against the defendants, as partners, under the style or L. D. Childs & Co. The contract, on the part of the defendants, was to make and deliver certain machinery for a cotton factory, and the breaches alleged were, that the machinery was not of proper materials and workmanship, nor delivered according to the contract. The plaintiffs introduced one *Stowe*, as a witness, who proved that, in January, 1846, a contract was entered into between the

plaintiff Neil, acting for the firm of Neil, Brown & Williams, and the defendant Childs, acting for the firm of L. D. Childs & Co., in which it was agreed, that the defendants would make and deliver certain machinery for a cotton factory at their warehouse by the 1st of August succeeding, and the plaintiffs agreed, that it should be paid for in cash on the delivery. It was also agreed, that the machinery should be made of the best materials and in the best style of workmanship. On cross-examination, it was stated by the witness, that, at the time the contract was made, he was a clerk of L. D. Childs & Co., then under the direction of the defendant, Childs, and that, in the presence of the plaintiff, Neil, he took down a memorandum, in which he specified the kinds of machinery and the price of each article. It was objected that proof of the verbal contract could not be given, if the contract was written in the manner stated by the witness. The objection was overruled. The witness proved, that the machinery was not delivered until January, 1847, and that its materials and style of workmanship were inferior to those agreed upon. The defendants then offered and read the deposition of one Springstein, to prove the value of the machinery. This deposition had been taken by the plaintiffs, but was not offered by them.

The plaintiffs introduced a witness to prove, that the witness, Springstein, had hostile feelings to them, when the deposition was taken, and that he had made statements contradictory of the deposition, before it was taken. This testimony was objected to, but admitted by the court. The defendants objected that the plaintiffs could not recover, because there was no proof, that the machinery, though delivered to the plaintiffs and received by them, had been paid for, before the suit was brought. The objection was overruled. It was objected further, that the plaintiffs could not recover, because there was no proof of the partnership of L. D. Childs and W. J. Hoke.

On this point the court charged the jury, that, though this were true, yet, if the plaintiffs had satisfied them that they were entitled to recover against the defendant, Childs, they might render their verdict against him only. The jury found a verdict against both, and from the judgment thereon, the defendants appealed.

*Alexander*, *Osborne* and *Bynum*, for the plaintiffs.
*Landers* and *Guion*, for the defendants.

PEARSON, J. There is no error in any of the exceptions taken by the defendants. The memorandum, made by the defendant's clerk, was not signed by the parties, or intended by them as the memorial of their contract. It was a private entry for the use of the defendants, and might have been used to refresh the memory of the witness. If the witness, Springstein, had been called and examined, or if his deposition had been read by the plaintiff, the exception would have raised the question, whether a party can impeach his own witness, in whose testimony he is disappointed, by shewing that he had, on other occasions, stated differently. The reason for not allowing a party to impeach his own witness, by showing his *general character* to be bad, is, that he shall not be heard to say, that he attempted to impose on the jury, by calling a witness, whose general character is known to be bad; but this reason does not apply to the exclusion of declarations made on other occasions, and by which, the party, calling a witness, might have been deceived. The question is one of some interest, but we are not called on now to decide it, as it does not arise in this case, for a party does not make one his witness by taking his deposition, which he declines to read, or by having a witness subpœnaed, and then declining to examine him.

The machinery was to be paid for on delivery. The payment of the price was not a condition precedent to the

plaintiff's right of action. The defendants might have refused to deliver it, unless the price was paid, or they were at liberty to deliver it and bring an action for the price. The last exception is also untenable. In an action against two, a recovery may be had against one of the defendants only, for all contracts are several, although made by partners. *Jones* v. *Ross*, 2 Car. L. Rep., 450; *Bradhurst* v. *Pearson*, decided at this Term. The question, however, does not arise, for the jury found a verdict against both defendants, and there is no exception on that ground. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

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DOE ON DEMISE OF WILLIAMSON v. JONAS BEDFORD.

Where a party claims as purchaser under an execution, issuing from a court of equity, and alleges, that the other party claimed under a deed, in fraud of the execution creditor, he must shew the decree of the court, as well as the execution, and, to make the decree evidence, it is requisite to have the bill and answer, and so much of the pleadings and orders as would shew that the decree was pronounced in a cause, properly constituted between parties.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

The action was tried in November, 1848, and the lessor of the plaintiff claimed under a sale by the sheriff on a *fieri facias*, against the lands of Squire Simmons, pur-

porting to be issued for the sum of $2,227, which Benjamin Logan recovered from Simmons by a decree of the Supreme Court in a suit in equity, lately pending therein between those parties and others. The plaintiff offered in evidence a certified copy of the execution and of the final decree, as stated in the execution, without the pleadings or any other proceedings in the cause. Upon objection made, the court held the evidence insufficient; and the plaintiff submitted to a non-suit and appealed.

*Guion* and *Bynum*, for the plaintiff.
*Baxter*, for the defendant.

RUFFIN, C. J. As the defendant in this suit was not the defendant in the execution, and it did not appear that the former came in under the latter after the lien of the execution attached, it must be assumed, that the plaintiff alleged a prior purchase by Bedford in fraud of the creditors of Simmons. Consequently, it was necessary that the plaintiff should produce the decree, as well as the execution, in order to establish that Logan was a creditor; *Rutherford* v. *Robeson*, (at this term,) and in order to make the decree evidence, it was, of course, requisite to have the bill and answer, and, so much of the pleadings and orders as would show, that the decree was pronounced in a cause properly constituted between parties.

PER CURIAM. Judgment affirmed.

ABSALOM SHERRILL v. ANDREW H. SHUFORD.

It is no answer for a sheriff to say, when sued for negligence in not executing process against a debtor, that the debtor, even after being imprisoned under a *ca. sa.*, might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the judgment creditor.

The true inquiry is, has the sheriff, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property, which might, by due process, have been subject to it, the sheriff shall be liable to the amount of the debt, which might have been thus secured.

Appeal from the Superior Court of Law of CATAWBA County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

The action is brought in debt on the defendant's official bond, as sheriff of Catawba county. The breach assigned is, in not using due diligence to collect a note put into his hands. One Douglass owed the plaintiff one hundred dollars, due by note, which he put into the hands of the plaintiff on Thursday, together with a warrant and a bail bond, and took from him a receipt for the same. At the same time he informed the defendant that Douglass was in the county, and he wanted him to execute the process forthwith. Douglass had been a citizen of Catawba county, but had removed to Tennessee, taking with him several negroes, and it was proved that he had the same negroes some time after his arrival, and a tract of land and a considerable quantity of stock. When he removed he was reported to be insolvent. When the defendant received the note and warrant, he said he could not execute the process until Saturday, as he had an engage-

ment to sell some property the next day at Newton. On Saturday morning the defendant started, as he alleged, to serve the process, when he was informed that Douglass had started on his return to Tennessee, and that he could not overtake him, until he got out of the county. Douglass took with him, when he left, a mare and colt, worth from $75 to $80, which were in his possession when the warrant was put into the defendant's hands. Douglass left on Sunday morning.

Upon the subject of damages, his Honor instructed the jury, that, if the defendant, by using proper diligence, could have subjected the horses to the payment of the debt, which Douglass owed the plaintiff, then the latter would be entitled to a verdict for the value of the horses. As to the property in Tennessee, the jury was instructed, that the plaintiff had no way to subject that, directly, to the payment of his debt, but if the defendant had executed the warrant, and had held Douglass to bail, he might have been thereby compelled to go to jail, and, before he could have taken the oath of an insolvent debtor, he would have been obliged to make a surrender, in his schedule or otherwise, of the property in Tennessee. But, in considering the value of the chance of the plaintiff's collecting his debt in this way, or in any other, if Douglass had given bail, it was necessary for them to advert to the testimony of Douglass' insolvency, and his right by deed of trust, and other legal means, to prefer his other creditors.

The verdict was for the plaintiff, and under the instructions of the judge, the damages were assessed at six-pence. From the judgment, upon this verdict, the plaintiff appealed, and excepted to the charge, upon the subject of damages.

*Boyden* and *Guion*, for the plaintiff.

*H. C. Jones* and *Gaither*, for the defendant.

NASH, J. The plaintiff is not entitled to a new trial, unless the court, in its charge, committed some error in law. We think the latter part of the judge's charge is erroneous in two particulars. There was no evidence in the case to support it, and it was incorrect in law. We are to presume that the exception contains all the evidence upon which the charge was bottomed. There was then no evidence of the insolvency of Douglass. On the contrary, the case states, that, at the time the warrant was put into the hands of the defendant, he had two horses, which he carried off with him, when he left the state, and a plantation and negroes and stock in Tennessee. But the rule laid down, by which the jury were to calculate the plaintiff's chance of securing his debt, has no foundation in law. It is true that a debtor, even after being imprisoned under a *ca. sa.*, may pay other *bona fide* debts, to the disappointment of his judgment creditor, but that he *may* do so is no evidence that he will do so, nor is it any answer in the mouth of the sheriff, when sued for negligence in not executing a writ. If it can shield the sheriff in this case, from answering in substantial damages, it will answer in any other, where the defendant may owe more than he can pay. In all such cases, the officer may keep the writ in his pocket, and, when sued, turn upon the plaintiff and say, "you have suffered no injury; if I had executed the writ and taken bail, the defendant might have paid away all his property, in discharge of other debts, and you would have got nothing." This cannot be the law. The true inquiry is, has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might, by due process, have been subject to it, he shall answer to the full amount of the debt; and his Honor in his charge very fully pointed out to the jury how that might have been done, if the process had been served. Another

objection to the part of the charge we are considering is, that there is no evidence that Douglass owed one cent, but what he owed to this plaintiff. There was no error in refusing the charge required. If the defendant could not, by any diligence, have collected the debt from Douglass, then the plaintiff had suffered no actual loss, and the defendant was liable only to nominal damages.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

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DEN ON DEMISE OF MORRIS v. ALLEN, et al.

Where an agreement was made between a father and his sons, that they should purchase his land at execution sale, at an under-value, for his use and for the purpose of keeping off other creditors; *Held*, that a purchase by the sons under such circumstances was fraudulent and void against creditors, whether the money was furnished by the father or paid out of their own means.

The case of *Dobson* v. *Erwin*, 1 Dev. & Bat., 569, cited and approved.

Appeal from the Superior Court of Law of McDOWELL County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

Both parties claim under sales by executions against John Allen, under the following circumstances: One John McEntire had a judgment against John Allen, on which a balance of $400 was due in August, 1840, and the premises were then sold by the sheriff, under a *fieri facias* on that judgment, and purchased at the price of $405 by the defendants, who are the sons of John Allen and took

a deed from the sheriff. On the 16th of September, 1837, John Allen, as the surety of another person, gave a bond to Morris, the lessor of the plaintiff, for $1,000, payable two days after date; and a suit was commenced thereon in March, 1841, in the superior court of Burke, and judgment obtained in October, 1842, for $1,223.95. On the 10th of December, 1842, a *fieri facias* was sued out thereon, directed and delivered to the sheriff of Burke, returnable to the spring term, 1843, which was levied on the premises on the 6th of March, 1843, by the sheriff of Burke, who sold them at Morganton, on the 19th of April, 1843, at $500, to the lessor of the plaintiff and made him a deed. The premises are situated in that portion of McDowell county, which was taken from Burke county, and the levy of the execution was made before the first county court held for McDowell, but the sale afterwards. The plaintiff then gave evidence that the premises were, at the time of the purchase by the defendants, of the value of $1,500, and that John Allen was much indebted to another person and was totally insolvent. And the plaintiff further gave evidence, tending to shew, that the money, which the defendants paid for the premises, belonged to their father; and also that there was an agreement between John Allen and his sons, the defendants, that the defendants should bid off the land and take the title to themselves, for the purpose of securing the enjoyment to the father, and with the intent to defraud the plaintiff and other creditors of the father of their debts.

Thereupon the defendants moved the court to instruct the jury, that the sheriff of Burke had no authority to sell the land at Morganton, and therefore that no title passed by his deed to the lessor of the plaintiff. But the court refused to give the instruction. And his Honor then stated his opinion to the jury, that, if John Allen furnished the purchase-money, paid by the defendants to the sheriff, to the intent that the sons should take the title to them-

selves and thereby defeat the other creditors of the father, the purchase of the defendants was fraudulent and void, although the plaintiff in the execution, McEntire, and the sheriff were parties to such agreement. And furthermore, if there was an agreement between John Allen and the defendants, that they should buy the land at the sheriff's sale and take the deed to themselves, but so that the father might possess and enjoy it, and with the intention to defeat the lessor of the plaintiff and his other creditors of their just debts, that then the purchase of the defendants would likewise be fraudulent and void, although the defendants paid their own money. There was a verdict for the plaintiff, and the defendants appealed from the judgment.

*Avery* and *Gaither*, for the plaintiff
*Bynum* and *N. W. Woodfin*, for the defendants.

RUFFIN, C. J. By the general law, the sheriff of Burke, if he had authority to sell at all, was obliged to sell at the court-house of his own county; and he could not, therefore, go to the court-house of the new county for that purpose. Rev. St., ch. 45, sec. 10. The first question turns, then, upon the power and duty of the sheriff of Burke to make the sale. We think very clearly that he was the person, under the acts establishing McDowell, 1842, c. 10 and 11. That county was constituted of parts of Rutherford and Burke; and, by the 8th section of ch. 11, it is enacted that all process issued from the superior courts of Burke and Rutherford against the citizens of McDowell, until a sheriff shall have been elected for McDowell, shall be executed by the sheriff of Burke or Rutherford; and that, after that time, such process shall be directed to the sheriff of McDowell and be executed by him. And the 8th section enacts "that nothing in this act shall be construed so as to prohibit the sheriffs of Burke and Ruther-

ford from collecting such moneys as are due or may become due on any judgment before the first court for McDowell." From those provisions it is plain the legislature did not mean that a creditor should be defeated or delayed of execution for his debt by the division of the county. On the contrary, executions, taken out from the courts of Burke, were to be directed to the sheriff of Burke, until there should be a county court and sheriff for McDowell; and, of course, the sheriff to whom the execution was by law to be directed and was directed, is the proper officer to execute it; and it is the sole purpose of the 8th section to provide against a contrary construction, in respect to the officers mentioned in it.

The court agrees also to the instructions given to the jury under the evidence. It is true that the exception does not set forth the evidence in detail, and therefore we cannot affirm positively what it was. But it is stated, in general terms, that it tended to prove an agreement between the father and sons before the sale, that the land should be sold by the sheriff and the sons should buy it and take a conveyance, to the double intent that the father should still enjoy it, and that his other creditors should be defrauded; and, under the verdict of the jury, it must be taken that the evidence did establish such an agreement and upon those intents. Indeed, it was admitted at the bar, that the facts upon the trial were clearly against the honesty of the transaction between the father and sons, if, upon the supposition of the sons paying their own money, in point of law, there could be a fraud, which would avoid the sheriff's deed at law. We do not think that the plaintiff's case necessarily depends on avoiding the deed to the defendants, by reason of the fraud in their purchase. For, if they bought in trust for their father, whether *bona fide* or not, the land would be liable under the act of 1812 to execution for his debts, unless it was a part of the agreement, and that *bona fide* and

openly, that the sons should take the sheriff's deed, as a security, for the sum paid by them for the land, or some other debt. No doubt such a transaction in good faith would be supported, as was mentioned in *Dobson* v. *Erwin*, 1 Dev. & Bat., 569; and then the interest of the father could only be sold under execution, if at all, as an equity of redemption, and subject to the payment of the sums advanced by the sons, as a debt to them. But nothing of that kind is suggested here. On the contrary, the case is that an insolvent father and his sons contrive to bring a tract of land, worth $1,500, to sale on execution, with the view that the sons shall buy it at a great under-value, and hold it upon a secret trust for the father, in order by those means to defeat creditors. It would be surprising, if a transaction so obviously covinous and injurious to creditors, and tending so directly to enable debtors in effect to keep back parts of their property from their creditors, could be supported, or that the common law should not be competent to detect and redress it. In the case of *Dobson* v. *Erwin*, it was held, that if the debtor advanced the money, or a considerable part of it, to make the purchase at the sale of the sheriff, and the purchase was made for his own use, that was a fraud which would avoid the title, though the sale was at the instance of another and for a just debt. For, in such a case, the sale, though in form that of the sheriff, is, by the contrivance of the debtor and the purchaser, and in respect of their fraudulent purpose, substantially as much a sale *inter partes*, as if there had been no intervention of the sheriff. It is the same thing precisely, though all the money paid to the sheriff be advanced by the person, to whom he makes the deed, provided only there be the same intent in each case to cheat creditors. But it is said, that, in such a case, the law cannot admit the idea, that the highest bidder at a public sale, who pays his own money, can have an intent to cheat the creditors of the former owner of the property, since

the sale is made by the law itself for a necessary purpose. But all know, that is no protection against frauds. Many frauds are committed on the debtors in such sales, by bringing them on by surprise, by suppressing bidding and the like. So likewise many debtors contrive by combinations with near relations or friends, at such sales, to have their property bought in at an under-value, in the hope that thereby other creditors will be kept off, while they will have the enjoyment of the property at but slight expense to their relations. A man with the money in his pocket refuses to apply it to the payment of a judgment debt, in order that an execution may issue and his property be sold, and bought for a small price by his family for his enjoyment, so that he may keep his money, and another creditor, who is expected to come shortly with an execution, may find nothing tangible, out of which he may make his debt. Surely there can be no clearer fraud, than such a contrivance to put a man's property out of the reach of an execution. The circumstance that the purchaser pays his own money is evidence, indeed, that the purchase was on his own account and *bona fide*. But it is certainly not conclusive; for, as mentioned by Lord MANSFIELD, in *Cadogan* v. *Kenneth*, Cowp., 432, there may be cases where a person gives a full price, and yet the thing, being done *mala fide* for the purpose of defaulting creditors, is fraudulent and void. So, if the father did not have the money, yet the case would be the same upon such an agreement and with such intent. Every man, whose property is offered for sale, whether by himself or an officer, is naturally disposed to get the most for it, at least a fair price; and it is the common experience, when nothing is meant but what is fair, that such a man uses some exertions to collect bidders and to induce them to go to a reasonable value. If he has other creditors, perhaps it is his duty to them thus

to act; and most men, who adequately feel the moral obligation of contracts, would probably do so. But, although that may be an imperfect duty, as there is no mode of enforcing it, yet the debtor's own interest would prompt him to the use of means for making the property, which was to be sold from him forever, go as high as he could, so as to reduce his indebtedness as much as possible; and in that way his creditors would get the benefit of his labors. But, if he were encouraged to make bargains beforehand with his friends, whereby it becomes his interest to desist from all exertions to make a fair sale, to disparage the property, to induce his family and friends secretly not to contend in the bidding with another man, who intends to buy, if it can be done at a sacrifice, and let him have the use of the property, it is manifest that it would open the door to very iniquitous practices to the prejudice of creditors. The conduct of such a debtor and purchaser, in reference to other creditors, is precisely analogous to that of a combination among others, to suppress competition in reference to the debtor himself. The debtor may not be bound to aid in getting a good price for the property; but it is a fraud on the law and other creditors, if he binds himself not to do so, or enters into agreements for his own benefit, which restrain him from doing so. Suppose, for example, that the creditor, whom it is the intent to defeat, resides at a distance, and that it is one part of the plan that the sale shall take place under the first execution, before he can know of it or be apprised of his debtor's embarrassments, and thereby prevent him from attending and making the property bring its value. Or suppose, that by consent between these parties and the sheriff, the sale is made without advertisement, with a view to a sacrifice; or that, with the same view, the debtor and his sons pull down the advertisements and prevent a general knowledge of the sale: it is obvious that in all those cases, and also in many

others, which may be conceived, great loss might be thrown on creditors and a corresponding gain unfairly obtained by the debtor and his family, which is altogether contrary to fair dealings and good morals. It is not doubted that a son may properly and ought to assist a reduced parent, and that he may do so by buying the father's land, as the highest bidder, when it is sold for his debts, in order to provide a home and a sustenance for him, provided it be done *bona fide* and openly. But that never can be the case when there is a previous agreement between the father and son for such a purchase, upon a secret trust for the father and with the intent to defeat a creditor, which implies that a loss is to arise to the creditor to the amount of the difference between the value of the land and the price to be given by the son, and that the father shall or will do nothing to prevent that loss, but, on the contrary, is to promote it in any way he can, so as to subserve his secret interests. In substance, such transactions, when the facts can be got at, must be deemed by the law contracts of the parties; and therefore, when it happens that the purchase is made at an under-value, and is thus to the actual prejudice of creditors, as, indeed, it was intended, it must be held void. For, it is clear, although the sale be made by the sheriff, yet it is only colorably so; for the inducement to the purchase arises, and the real contract for it is made beforehand, between the parties, and its execution is to be dependent upon the sales happening to be made at an under-value. Therefore the truth of the case is no more nor less than this. A debtor, who knows his land may soon be sold under execution, makes an agreement with a son that, for an inadequate price—paid to another creditor—a conveyance shall be made to him of the land as upon an absolute sale, but upon a secret trust for the debtor, and expressly for the purpose of defeating the expected execution; and the question is, whether that

transaction is to stand good against such creditors. Most certainly not. The purpose is iniquitous and the deed must be void.

PER CURIAM. Judgment affirmed.

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P. W. EDWARDS v. NELSON G. HOWELL.

Where A. had been constable in 1843, and again held the appointment in 1846, and, during the latter period, one says of him, that, while constable in 1843, he had made a false return, A. cannot maintain an action of slander for these words, unless he alleges and proves some special damages.

Words, slandering a man as to his conduct in his office, profession, &c., from which the law implies damages necessarily, must relate to the office, &c., in which the person slandered is engaged at the time of the speaking of the words.

Appeal from the Superior Court of Law of MACON County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of slander. The plaintiff had been a constable in the year 1843 and was again appointed in 1846. The defendant, speaking of a return made by the plaintiff on an execution, which had been in his hands as constable in 1843, said that he had made a false return. The words were spoken, while the plaintiff was acting as constable in 1846. Much testimony was given on the trial on both sides, but it is unnecessary to repeat it here. The jury, under the instructions of the court, returned a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

*N. W. Woodfin*, *J. W. Woodfin* and *Fitzgerald*, for the plaintiff.

*Henry*, *Edney* and *Baxter*, for the defendant.

PEARSON, J. The plaintiff was a constable in the year 1843. In 1846, he was again appointed and acted as constable. The defendant, in 1846, speaking of the plaintiff, while acting as constable in 1843, said, he had made a false return, in returning an execution in the defendant's favor against one Roland, "No goods." To charge a constable with making a false return, does not subject him to indictment for an offence, of which the punishment is infamous; and the words are therefore not actionable, without proof of special damage, unless it falls under the third class of cases, laid down in the books, as words which affect him in his office, profession or business, from which the law implies that some damage must necessarily be sustained, for it does not amount to perjury, although the return was false: the oath of an officer, although he is sworn, not being embraced within what the law terms a judicial oath, and not tending to defeat the administration of justice, which is necessary to constitute the crime of perjury, unless otherwise provided for by law. Starkie on Slander, page 12. The only question, then, is, whether the words spoken do amount to an imputation, which affects him in his office, profession or business, and we think they do not; for the office, which he held in 1843, had determined, at the time the words were spoken, and the charge made in 1846, of what he had done in 1843, did not, as a natural consequence, affect him in the *new office*. In 1st Vent. R., *Herle* v. *Osgood*, the words were "he was a debauched man and not fit to be a justice," and judgment was for the defendant, because the words were, spoken of a time past, and TWYSDEN Judge, said, it would have been otherwise, if the words had been, "he is a debauched man." So, in this case, the

words do not impute misconduct in the office which he was then filling, but referred to a distant and different office, which he had filled in 1843. If any special damage had resulted to the plaintiff from the speaking of the words, as that, in consequence thereof, certain persons would not put papers in his hands for collection, he might upon such proof have sustained his action, if special damage had been laid. But the law will not imply damage, as a matter of course, unless the words charge an indictable offence, for which the punishment is infamous, or unless the words impute an infectious disorder, which he then had, or are such as affect him in the office, profession or business in which he is then engaged. The office, in reference to which these words were spoken, is not the same, which the plaintiff was filling, at the time of the speaking of the words, and, as no special damage was proven, we are not disposed to extend the law further than decided cases; for, if every constable could sue in slander and recover damages, as a matter of course, whenever a charge was made, that he had been negligent in his office, and made a return, "No goods," unless it could be proven that by proper diligence he could have found some cattle, hogs and sheep to levy upon, there would be no end to litigation.

PER CURIAM. Judgment affirmed.

THE STATE v. ADDISON GIBSON.

In cases of assault and battery, the party, who strikes another, must be guilty, unless he be justified in committing it, as an act of self-defense. The law does not justify any assault by way of retaliation or revenge for a blow previously received.

Appeal from the Superior Court of Law of IREDELL County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This is an indictment for a battery on Jemima Sommers; and, on not guilty pleaded, she was sworn as a witness, and stated, that she was in her field at the fence, and that the defendant rode by and she asked him why he had been talking about her, and a quarrel ensued; and she then threw a stone at him, as he sat on his horse a few yards off, and missed him; and that she then threw a stick at him, which might have brushed against the side of his arm; and that then he got off his horse, picked up the branch of a sapling and walked up to the witness and struck her with it on the head. Another witness for the State deposed, that, after the affray, the defendant said he had just come from Mrs. Somers', and that she was a bad woman, and had thrown stones at him and had hit him with a stick; and that, to extricate himself, he was compelled to get off his horse and strike her with a stick; that he struck her on the head and she went off crying. The court directed the jury, that if they believed the defendant acted in self-defense, that is, to protect himself from bodily injury, they should

acquit him—otherwise, they ought to find him guilty. The defendant was convicted and after judgment he appealed.

*Attorney General*, for the State.

No counsel for the defendant.

RUFFIN, C. J. If there was any doubt in this case, it was upon the facts, and not upon the law; for we think the rule of law was properly laid down by his Honor. In an action against the defendant, his plea of *son assault demesne* must have averred, that the prosecutor, just before his alleged battery on her, made an assault on him and would *then* have beaten him, if he had not immediately defended himself against her; whereupon he did then and there defend himself against her, and, *in so doing*, did a little beat and ill-treat her. Precedent in 3 Chit. Pl., 1067. It is clear, therefore, that the law does not justify any assault by way of retaliation or revenge for a previous one by the prosecutrix, but only in the defendant's own defense; for it cannot be doubted, that a party must be liable to the public for an assault in any case, in which he would be to the private person in an action. In cases of homicide, indeed, there is an intermediate grade of guilt between that of the highest degree, murder, and a case of self-defense, which is manslaughter, in which there is palliation, but not justification. But in cases of battery merely, the party who strikes another must be guilty, unless he be justified in committing it, as an act of self-defense; for although, on the indictment, he need not plead the matter specially, but may insist on the defense under not guilty, yet the special matter given in evidence on not guilty, in order to be available, must be such as would support the special plea, if it had been necessary to put it in. It is true, the defendant need not generally shew affirmatively, that the other party was in the act of striking again when he struck; as that is to be presumed,

when the blow is returned immediately, or the parties are in the attitude or position, in which the first blow was given. It is, therefore, ordinarily, necessary, in order to repel the presumption, that something should come from the State to satisfy the jury, that in fact the first assailant had done, and that the defendant might have so seen; for, otherwise, the jury will generally and, indeed, naturally conclude, that the defendant returned the blow, not in malice and in vengeance, but in defense of himself. How it is in any particular case, is, of course, a question of fact for the jury; and, we suppose, they must have thought here, that, as the prosecutrix was a woman and several yards from the defendant, then on horseback on the opposite side of the fence, he could not have believed himself in further danger from her, and therefore that his alighting from his horse and going the several yards to her and striking her with a stick on the head, was not in defense of himself, but an act of unmanly aggression on her. At all events, the inquiry was one for the jury, and their decision cannot be reviewed here, as we think the law was properly laid down to them.

PEARSON, J. The judge charged that the defendant was guilty, unless he struck to protect himself from bodily injury, by which it is understood he means, unless after receiving one blow, it was necessary for him to strike in order to prevent another.

This, in cases of assaults and batteries, is fixing limits to the ground of defense, in my opinion, more narrow than the law contemplates, and I, therefore, with all deference, cannot concur with a majority of the Court. Our sturdy ancestors, "who built up the common law," did not require a man to turn and flee, when he received a blow; he is allowed to return blow for blow, provided he does not give an excessive blow, such as was not called for by the occasion; and this, not exclusively upon the ground, that it was necessary to protect himself on that particu-

lar occasion from further bodily injury, but because it is prompted by natural impulse, which originates in the principle of self-protection, and tends to self-defense in general, by having it understood that our persons are not to be assaulted with impunity, but that, if assaulted, a blow will be given in return. If one pulls the nose of another, or strikes a dastardly blow from behind, and starts to run off, so as to make it manifest, that there is no danger of his striking again, and is at the instant pursued and stricken as he deserves, no excess of force being used, can it be said the party, who returns the blow, is to be convicted for an assault and battery, and that he has no extra-judicial remedy in an emergency of the kind, because he had no reason to think that the assault would be repeated?

In cases of homicide, the ground of self-defense is more narrow, because the blow returned is excessive; the party is therefore required to retreat to the wall and not to take life, unless it be necessary to save his own life, or to avoid great bodily injury; but, in homicide, the law has provided a middle ground between conviction for murder and acquittal for self-defense—manslaughter. Hence the plea of self-defense is more restricted in homicide than in assault and battery, where there is no such middle ground: and the dividing line between conviction and acquittal in assaults and batteries takes in the middle ground on the side of acquittal. The authorities upon this question are less clear and distinct than might be supposed. Upon examination no direct authority can be found. In 1st East. P. C., 406, it is laid down, *son assault demesne* is no excuse, if the *retaliation* be excessive and bear no proportion to the necessity or the *provocation* received. So in 1st Haw., ch. 60, sec. 23. Blackstone, in his Commentaries, 3 vol., page 3, in treating of extra-judicial remedies, puts down in the first place self-defense, and holds, if one is attacked, it is lawful to repel

force by force, and the breach of the peace is chargeable to him who gives the first blow, for the law in such cases respects the passions of the human mind and makes it lawful in him to do himself *that immediate justice*, to which he is *prompted* by nature, and which no prudential motive is strong enough to restrain. It considers, that the future process of the law is by no means an adequate remedy.

From the general tone of the authorities, I am led to the conviction, that one who receives a blow is not restricted in self-defense, so as to be allowed to strike *only* in order to protect himself from *another* blow, but may excuse, upon the ground of self-defense, a reasonable retaliation for the blow received, although it be manifest, that the other party intends to give no *other* blow, and is allowed to do himself that *immediate justice*, to which he is prompted by nature.

Had this been the case of two men, the law, in my opinion, would be clear for the defendant, but as the person stricken was a woman, and the reasoning, upon which the law is founded, does not so forcibly apply, where the party giving the first blow is a female, I would willingly make a distinction, if any authority could be found for it.

PER CURIAM. Judgment affirmed.

JAMES GRAHAM v. JOHN W. GRAHAM.

A will is well attested by subscribing witnesses, when, though not in the same room with the testator, they are in such a situation, that the testator either sees, or has it in his power to see, that they are subscribing, as witnesses, the same paper he had signed as his will.

Where the supposed testator could only see the backs of the witnesses, but not the paper they were subscribing; *Held*, that the paper writing was not well attested as a will.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

This is an issue, *devisavit vel non*, made up under the statute to try the validity of a paper writing, propounded as the will of John Graham, deceased. The evidence was, that the supposed testator executed the will in the presence of two witnesses, and desired them to attest the instrument. He was lying in bed very sick at the time, and the two witnesses withdrew into another room, between which and the testator's sick chamber there was a door open, and at a large chest in that other room the witnesses signed their names. The bed, in which the deceased was lying, stood by the partition between the two rooms, and two or three feet from the door, and the chest, on which the witnesses subscribed the will, stood also against the other side of the partition, and nearly opposite to the bed; so that the testator, as he was lying in bed, could, by turning his head and looking around the side of the door, see the backs of the witnesses, as they sat at the chest writing, but he could not see their faces, arms, or hands, or the paper on which they wrote; a view of those being obstructed by

the partition. After the signing by the witnesses, they returned with the will into the room, where the testator was, and informed him they had witnessed it, and he requested a person present to take charge of it. The court directed the jury, that, though the testator could have seen enough of the persons of the witnesses, while they were subscribing the will, to enable him to recognize them, yet if he could not have seen what was going on, whilst they were in the act of attestation, the paper was not properly executed and attested. The jury found against the will, and from a judgment accordingly the executor appealed.

*Boyden* and *Craig*, for the plaintiff.

*Clarke*, for the defendant.

RUFFIN, C. J. The rule laid down by his Honor seems to be a very rigid construction of the terms "in his presence," which are used in the act; but it is in conformity with the cases hitherto decided on this subject, and, we believe, with the policy and meaning of the statute. Except in the case of a blind person, "presence seems to have been understood as having the same sense as "within view;" and it follows, that the thing to be seen, or to be within the power of the party to see, is the very fact of subscribing by the witness. Thus in *Shires* v. *Glascock*, 1 Atk., 688, which was the first or one of the first cases that occurred in England under the statute of frauds, it was held that a signing in another room, some yards distant from the testator, was a subscribing in his presence, because he might see it by a broken window: the Court saying, "that the statute required attesting in the presence of the testator, to prevent obtruding another will in the place of the true one;" therefore, that when "the signing is in the view of the testator, it is enough," though he should not actually see them signing. That, we take

it, is the true principle of the statute, that a subscribing by the witness must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see, that the paper signed by him is the same, which is subscribed by the witness. Therefore, when they subscribe out of the testator's room, and in such a situation that he cannot see the paper, and for that reason cannot see and know for himself, that it is the true paper, it cannot in any proper sense be said, that the thing was done in his presence. The statute meant, that he should have evidence of his own senses to the subscribing by the witnesses, just as he should to a signing for him by another by his direction and in his presence; so as to exclude almost the possibility of imposition by substituting one paper for another, without detection by the testator himself upon his own ocular observation, and without exposing him to any risks from undue confidence. *In Doe dem Wright* v. *Mansfield*, 1 M. & S., 294, Lord ELLENBOROUGH lays down this to be the rule: that, when the devisor cannot see "the act doing," that is out of his presence. And in the case of *Casson* v. *Dade*, 1 Bro. C. C., 99, Lord THURLOW held a will to be well executed, which was attested at the window of an attorney's office, because the testatrix was sitting in her carriage and it was put back to the window of the office, so that she "might see what passed;" so it is said in the other case of *Davy* v. *Smith*, Salk., 395, that the testator might have seen the witnesses "subscribe their names" if he would, and therefore that the will was well executed. We believe, indeed, that there is no instance, in which a paper has been sustained, where the attestation was under such circumstances, that the testator could not see what was done, so as to protect himself upon his own knowledge against any dishonest substitution by the people, whom he is obliged by the law to select, and depend upon, as subscribing witnesses to his will.

PER CURIAM. Judgment affirmed.

THE BUNCOMBE TURNPIKE COMPANY v. JOHN BAXTER.

The act of assembly, incorporating the town of Hendersonville and exempting the citizens of that town from working "on roads without the limits of that town," does not exempt them from working on the Buncombe Turnpike Road, as provided by the charter of the Buncombe Turnpike Company. The roads referred to in the act of incorporation are the *ordinary* public roads of the county.

The case of *Drake* v. *Drake*, 4 Dev., 110, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1848, his Honor, Judge *Battle*, presiding.

By the act of 1824, incorporating the Buncombe Turnpike Company, all hands liable to work on roads in Buncombe, residing within two miles on either side of the turnpike road, are made liable to do six days' work on it annually, and those who do not, when warned, are made liable to the penalties, which could then be collected from persons failing to work on public roads in the state. Afterwards Henderson county was established out of a part of the territory of Buncombe, through which the turnpike ran; and the defendant lived in Hendersonville, within two miles of the road, and became liable to work on it. The present action was commenced by warrant for $4, for failing to work on the road, four days in February and March, 1848, and it was admitted on the trial, that there should be judgment for the plaintiff, unless, in point of law, the defendant was exonerated from working on the turnpike by an act, passed in the year 1846, to incorporate the town of Hendersonville. By that act it is enacted, amongst other things, that the commissioners of

the town shall appoint an overseer of the streets of the town, and that all persons residing in the town, liable by law to work on roads, shall be required to work on the streets, as often as shall be necessary; and also, "that all persons, living within the limits of said town, liable to work on public roads, be and they are hereby exempted from working on roads, within the limits of said corporation." The turnpike road passes through the town of Hendersonville for three-quarters of a mile, and forms its principal street. The defendant is a citizen of Hendersonville and resides in it, and worked under the overseer of the streets. But, for the four days, for which the present suit is brought, the defendant was summoned to work on the turnpike road without the town of Hendersonville, and refused to do so. The case was submitted to the court on these facts as admitted; and his Honor gave judgment for the defendant, and there was an appeal to this Court.

*N. W. Woodfin*, for the plaintiff.
*Henry*, for the defendant.

RUFFIN, C. J. The judgment is considered erroneous by this Court. It is true, the act, in terms, exempts the citizens of this town from working *on roads* without the corporation, and therefore it is broad enough to embrace this case, if that expression is not controlled by the context, or the nature of the subject and the statute. It is said, indeed, on the part of the plaintiff, that such an exemption as that claimed by the defendant, is beyond the legislative power to grant, because it is inconsistent with the previous charter to the plaintiff, whereby the work of the defendant was assured by the state to the company. We do not deem it necessary, nor proper, unnecessarily to express an opinion upon the question of constitutional power. It is, nevertheless, material to observe that there

is such a stipulation in the charter of the Turnpike Company, in compensation for the privilege thereby reserved to all the citizens of Buncombe county to pass the plaintiff's road, toll free. It is material to advert to that stipulation, as a help to the just construction of the subsequent town charter; for, certainly, no intention to violate the public faith and contracts is to be imputed to the legislator, if it can be avoided, admitting even the power to do so. Hence, if the statute we are considering were a public one, the construction ought to be such as is consistent with the public engagements in previous statutes, if the language will admit of it; and resort is properly had to the context, in order to give to general terms a more enlarged or restricted sense, so as to effectuate the intention of the legislature, in accordance with the rights before granted to some of her citizens and with the character of the state. In other words, an intention to do wilful injustice by invading private right is not to be attributed to the legislature, when, by any fair intendment, a different and a just meaning can be put on the language. Now, the case is, that this defendant was liable, by a provision in the charter of the plaintiff, to work six days every year on the turnpike road, and made so liable for a valuable consideration, moving from the company to his fellow citizens of his county, and that, by the general law, the defendant was also liable to work on the other roads—the common highways of the county—as he might be appointed by his county court from time to time. In that state of things a law was passed, that he, as a citizen of an incorporated village, should work on its streets, and for that should be exempted from working "on roads" without the town. To the question, what roads were meant, one would naturally say at once, that the legislature did not mean to violate its prior engagement nor deal unjustly, and therefore could have intended only to

relieve the inhabitants of the town, who alone work on its streets, from the burden of being appointed by the court to work on the ordinary county roads, in respect to which the legislature has an absolute and rightful discretion. The construction is thoroughly fortified by the previous part of the sentence, in which it is said, that the citizens of the town, who are "liable to work on *public roads*," are to be exempted from working *on roads;* from which the inference is a fair one, that the roads, from working on which they are exempted, are those, and those only, on which they were immediately before liable to work, namely, the public roads, or such as belong to the public only, and in which there was no private right. Such would be the proper interpretation, we think, were the statute under consideration a public one; and much more is it, when it is remembered, that it is a private act, incorporating a small village, and that the rule for construing such a statute is, that they do not bind strangers not mentioned in them, or, at all events, in derogation of private right, beyond a construction rendered absolutely necessary by its words. 2 Bl. Com., 345: 1 Thomas' Coke, 26; *Drake* v. *Drake*, 4 Dev., 110. For these reasons the Court is of opinion that judgment be given for the plaintiff for $4 and the costs, according to the case agreed.

PER CURIAM. Judgment reversed, and judgment for the plaintiff.

JOSEPH STARNES, et al. v. JAMES ERWIN.

If the promise declared on be an absolute one and that proved be conditional, the variance is fatal, as where the plaintiffs declared, that, in consideration the plaintiffs would pay the defendant one hundred dollars for the lease of a gold mine, he would warrant that they should make that sum in ten days; and the promise proved was, *if they would do the work*, he would warrant, &c.; *Held*, that the variance was substantive and fatal.

In an action on a verbal agreement, alleged to contain a warranty, it is competent for the jury to decide, whether the word "warrant" was used by the vendor, merely as a word of high commendation of the subject of the trade, or whether it was intended to import that the vendor would be liable in damages, if the thing sold should not answer the description.

The case of *Islay* v. *Stewart*, 4 Dev. & Bat., 160, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Fall Term, 1847, his Honor, Judge *Pearson*, presiding.

The plaintiffs' declaration contains two counts: the first on a warranty; the second, for money had and received. The defendant possessed a lease in a gold mine which had an unexpired term of three years to run, and which the plaintiff purchased from him at the price of $100, and paid it before the beginning of this action. The declaration sets forth, that, at the time of making the contract and in consideration of the price to be paid, the said James Erwin "undertook and then and there faithfully promised the said Joseph Starnes and the said Salathiel Harris, that he, the said James Erwin, would warrant the said Joseph Starnes and Salathiel Harris, if they would purchase his said interest in the said gold mine, at the said sum of $100, they should make in ten

days out of the said gold mine the said sum of $100, &c. The evidence was, that the plaintiffs applied to the defendant to purchase his interest in the gold mine, and the defendant said they could have it for $100. Harris said, that was high; the defendant replied, "but for the death of my wife, I would not take that price; if you buy, I will warrant you to make the money in ten days. Come up in in a few days and we will look at it." Starnes said it would do no good to look at it; the shaft is full of water; I will buy it on your honor. The defendant said, if you will do the work I will warrant you will make your money in ten days. Starnes said I will do the work. They then fixed on a day to meet, to get Mr. Elms to do the writing.

Under the charge of the court there was a verdict for the defendant and the plaintiffs appealed.

*Clarke* and *Boyden*, for the plaintiffs.
*Osborne* and *Wilson*, for the defendant.

NASH, J. The contract proved is different from that declared on. In the former, the warranty, if made, was qualified by the understanding and express agreement of the parties, that they should do the work. The contract declared on has no such stipulation, but is an unqualified undertaking by the defendant, that, if they should buy, they should make one hundred dollars in ten days. It is not necessary that a contract should be set out in the declaration *in hoc verbo:* a statement substantially correct is sufficient. The promise must, however, be correctly set out, and any substantive variation between the promise laid and that proved will be fatal. When a declaration stated, that the defendant, on the sale of a horse, warranted him to be sound, and the proof was of a warranty of soundness everywhere, except a kick on the leg, the variance was held to be fatal. *Jones* v. *Cowly*, 4 B. & Cres., 445. So where the declaration stated the

warranty to be on the sale of one horse, and the proof showed a sale to the plaintiff of two horses belonging to different persons by the same contract, the court held the evidence did not support the declaration. *Symonds* v. *Carr*, 1 Camp., 261 ; 1st Arch. N. P., 94–95. For this variance the judgment must be affirmed. If, however, the declaration set out the contract, as it is proved, it would be defective and insufficient to sustain the action, for the want of an averment that the plaintiffs had worked the mine. The defendant's warranty was a special one, or rather a conditional one ; if they would do the work, that is, the necessary work, they would make the money in ten days. The plaintiffs nowhere in their declaration aver, that they worked the mine at all ; much less for ten days. All that is said about it is, that the said Joseph Starnes and Salathiel Harris have been put to great charges and expense of their money in and about the working and digging in the said mine, &c. This is not an averment. An averment is a positive statement of facts in opposition to argument or inference. 1 Arch. N. P., 320. There is no statement, as a fact, that they did work the mine, or, if so, that they worked it for ten days or that they worked with hands in sufficient number to make $100 in ten days. We are further of opinion, that his Honor was correct in his charge to the jury. He instructed them, that, if, from the whole conversation, the subject matter, &c., they should come to the conclusion "that the word warrant was used, as a word of high commendation and praise, so as to induce the trade, and not as importing an undertaking to make good in damages, if the money was not made in ten days, the defendant would not be liable in this action." The word warrant, as used by the parties on this occasion, was a fit subject for the consideration of the jury, as a matter of fact ; it was a verbal agreement in relation to a matter, upon which

there was room to doubt. *Islay* v. *Stewart*, 4 Dev. & Bat., 160. The doubt was greatly increased by a fact proved by the plaintiffs, that, when the defendant urged the plaintiffs to come up in a few days and look at the mine, one of them replied, that will do no good, the shaft is full of water; I will have to rely on your honor; and when they did meet and complete the bargain, no mention was made of any warranty.

Upon the 2d count the plaintiffs cannot recover. They are still in the possession of the mine, or were at the time the action was brought, as far as the case shows, or if the lease had expired at the time of the action brought, there is no evidence that they did not enjoy the term they purchased.

PER CURIAM. Judgment affirmed.

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THE STATE on the relation of BOGER v. ROBERT BRADSHAW, et al.

Where a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is attached to the office by statute, such bond, given subsequently to the latter statute, embraces a new duty, and is a security for its performance; unless where, when the new duty is attached, a bond is required to be given specifically for its performance.

The cases of *Cameron* v. *Campbell*, 3 Hawks., 285; *Crumpler* v. *The Governor*, 1 Dev., 52; *The Governor* v. *Barr*, 1 Dev., 65, and *The Governor* v. *Matlock*, 1 Dev., 213, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

STATE v. BRADSHAW.

This is an action of debt on a general bond, given by the sheriff of Rowan, in the sum of $10,000, for the discharge of the duties of his office, for the year 1847, of which the condition is in the form prescribed by the statute. Rev. St., c. 109, s. 13. The breaches assigned are, that the sheriff failed to collect the town taxes of Salisbury for the year 1847, and secondly, that he collected the taxes and failed to pay them to the relator, the treasurer of the town. After *oyer* of the bond and condition, the defendants pleaded, conditions performed, and no breach, &c.

A verdict was found for the plaintiff, subject to the opinion of the court, whether the sureties were liable on the bond for this demand, upon the following statement. By a private statute, passed in the year 1794, to amend the laws regulating the town of Salisbury, it was enacted, that the commissioners of the town should annually appoint a person to collect the taxes assessed for the town, and that such person should enter into bond with sufficient sureties in a sum not less than $100, to the commissioners, for the faithful discharge of his duty; and it makes it the duty of the persons so appointed to give such bond and to collect the taxes, and pay the same to the treasurer of the town on or before the first Monday in August in each year. By another private act, passed in the year 1825, it was enacted, that the first five working days in March, in every year, shall be the time in which the tax list for the town shall be given in; and that, on the 20th of March the commissioners shall appoint three assessors to value and assess the real estate in the town for taxes, who shall, within three days, file their assessment with the commissioners, who shall thereupon proceed to lay the taxes, and that, within ten days after the commissioners shall have laid the taxes, the clerk of the board of commissioners shall deliver to the town constable, or to the person whom they may appoint to collect the said taxes, an

accurate copy of the return, &c., and annex the valuation of each person's property, as made by the assessors, together with the amount of taxes due thereon; and that the town constable, or person appointed to collect the taxes, shall, within three months after the list is placed in his hands, account for and pay over to the treasurer of the board of commissioners all such sums as he may be made liable and accountable for by virtue of his appointment; and that such constable or collector may, within one year afterwards, collect the same, notwithstanding he may have paid the same to the commissioners; and that the commissioners shall annually deliver to the constable, or other person appointed to collect the taxes, a warrant under their hands authorizing the said person to demand and receive the taxes. By another act, passed in the year 1827, the sheriff of Rowan county is authorized and required to collect, pay over and account for the taxes, imposed by the commissioners of the town of Salisbury, on the citizens and property therein, in like manner and under the same rules and regulations, as were then prescribed for the government of the town constable, or collector, by the aforesaid act of 1825. Under that act of 1827, the sheriff received the list and collected the taxes of 1847, or became liable for the same.

Upon the point reserved, the court was of opinion with the defendants, and set aside the verdict and entered a nonsuit, according to the agreement of the parties; and the relator appealed.

*Clarke* and *Boyden*, for the plaintiff.

*Osborne* and *Craige*, for the defendants.

RUFFIN, C. J. The liability of the sheriff himself for the taxes, in a proper action, is not disputed; and the only point is, whether he and his sureties are liable therefor upon his general official bond for 1847. We own

that we see no reason why they should not be. The act of 1827 imposed the duty on the sheriff of collecting the town taxes; and one part of the condition of the bond, after enumerating several particular duties of the sheriff, is, that "he shall pay all money by him received by virtue of any process to the person or persons to whom the same shall be due, and in all other things well, truly, and faithfully execute the said office of sheriff, during his continuance therein." Those words are therefore broad enough to cover the present case; and the principle laid down in *Cameron* v. *Campbell*, 3 Hawks., 285, and in other cases, is a sound one, that when a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is afterwards attached to the office by statute, such bond, given subsequently to the latter statute, embraces the new duty, and is a security for its performance. If it be not so, then with the creation of every additional duty of an officer, there would be a necessity for requiring a separate special security—which has never been done or thought of. The contrary, however, is supposed to be established by the cases of *Crumpler* v. *The Governor*, 1 Dev., 52, and *The Governor* v. *Barr*, 1 Dev.,65, and *Governor* v. *Matlock*, 1 Dev., 213, in which it was held that the general words, in the conclusion of the general bond of the sheriff, did not extend to the public and county taxes. But those exceptions were expressly placed on the ground that the statutes, which made it the duty of the sheriff to collect those taxes, required separate bonds as securities for each species of tax. The construction was that those bonds were, upon the intention, not cumulative, but special securities for the revenue of each kind, inasmuch as, if it were not so, the interests of the public and private persons would often come in conflict, and, indeed, the penalty of the bond would often be exhausted by the public, leaving nothing or but little as a security for individuals. To use the expressive language of Judge HENDERSON in

*Matlock's* case, the law, which requires a sheriff to give bond for the collection of the taxes, "withdraws the obligations imposed by that law from the bond for the discharge of his ordinary official duties." But that is not the case here. There was an attempt to shew that it is, by a reference to the provisions in the act of 1794; which authorized the commissioners to take a bond from a collector appointed by that board. But that is restricted to the officer, who might be thus appointed, and cannot be extended either to the constable or the sheriff, who are required to collect the taxes by the subsequent acts; and the reason was, plainly, that those officers had already given bonds that were deemed sufficient. Such was the case with the town constable, under the statutes then in force, and to that the act of 1827 must have reference. To shew that the power and duty of the sheriff to collect the taxes were not to depend on the sheriff's first giving a bond therefor, we have only to advert to the supposition, that he had refused to give such a bond, and consider the consequence. If the defendant's argument be right, it would put it in the power of the sheriff, at his own will, to evade a duty, expressly imposed on him by the statute, or he would have been liable to the town for the damages sustained by his not giving the bond, and thereby qualifying himself to collect the taxes—which would have been a breach of duty within the words of the official bond, for which he would have been liable for precisely the damages demanded in this suit, namely, the taxes which he ought to have collected. A construction, leading to such an absurdity, cannot be the true one. The words in the act of 1827, that the sheriff is to collect and account for the taxes "in like manner and under the same rules and regulations as were prescribed for the constable and collector under the act of 1825," refer only to the periods for the assessment of the taxes, making out and delivering the

list and warrants, and of the collection and payment of the money; and they cannot be connected with the act of 1794, requiring a special bond for that purpose. None was deemed necessary, when the duty was imposed on the sheriff, and one was not required.

The judgment must therefore be reversed and judgment be entered for the plaintiff upon the verdict.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

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THE STATE v. JOHN WALKER, et al.

To make a forcible trespass indictable, some person must be in the house or on the premises, to cause the acts complained of to amount to a breach of the public peace or have an immediate tendency to provoke it—some person who has a right to defend the possession or to be provoked at its invasion.

The indictment for forcible trespass must charge, who was present at the time of the alleged trespass, and if, on the trial, it appears that such person was not present, the defendant must be acquitted.

The case of *The State* v. *Fort*, 4 Dev. & Bat., 192, cited and approved.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Fall Term, 1848, his Honor, Judge *Bailey*, presiding.

The facts of this case are sufficiently stated in the opinion of the Court.

*Attorney General*, for the State.

*Bynum*, for the defendant.

STATE *v.* WALKER.

NASH, J. This is a prosecution, against the defendants, for a forcible trespass to the dwelling house and yard of James Hunt. It is sometimes very difficult to distinguish between a civil and criminal trespass—between one which gives merely a civil action, and one, which amounts to a crime punishable by indictment. No such difficulty exists here; it is not denied, but that the acts and conduct of the defendants, as set forth in the indictment, do constitute a criminal offence; that of a forcible trespass. The difficulty arises out of the fact, that the indictment charges the presence of James Hunt, when the acts complained of were perpetrated; the language is "he the said James Hunt, then and there, being therein, and forbidding, &c." The special verdict finds, that James Hunt was not there, but was absent, and did not return until the day after the violence was committed. It was proper the indictment should have laid the possession of the house and yard in James Hunt, but it was not necessary, in order to constitute the offence intended to be charged, that he should have been present at the time. The possession of his family was his possession, but their presence was not his presence; a mere trespass to the dwelling house of a man is not, of itself, indictable. To make it so, it must be done under such circumstances, as amount to a breach of the public peace, or have an immediate tendency to provoke it. *State* v. *Fort*, 4 Dev. & Bat., 103. Some person, therefore, must be in the house or premises, to cause the acts complained of to have that effect; some person, who has the right to defend the possession or to be provoked at its invasion. It was sufficient, then, to have constituted the acts, of which the defendants were guilty, a public offence, that the family, the wife and children of James Hunt, were present; they had a right to defend the possession. But the indictment charges that James Hunt was present. The fact, as found by the special verdict, is, that he was not there. It

is a general rule, both in criminal and civil proceedings, that the evidence shall be confined to the point in issue; particularly so, is it in criminal proceedings, from the increased consequences to the accused. An indictment is defined by Mr. Blackstone to be a written accusation against the individual charged—it is, in substance, the declaration of the state, setting forth the offence of which she complains. It is no more competent to depart from the charge, contained in the indictment, than from the cause of action set forth in a declaration. The allegation that James Hunt was there, forbidding the acts of the defendants, is a material part of the charge in this indictment, and cannot be thrown aside as surplusage. To suffer judgment to pass against the defendants upon this indictment, would be to try them on one charge, and convict them on another. The charge in the indictment, and that set forth in the special verdict, are distinct and several. The jury could not say, the defendants were guilty in manner and form as charged—which was the issue submitted to them—and, unless so guilty, they were not guilty at all; they therefore found the facts, and presented them to the court and asked its advice. The court ordered judgment to be entered for the defendants. In *Smith's* case, 2 Ire., 127, there was a material variance, between the averment of the indictment of the presence of the prosecutrix, and the facts found by the special verdict; in the latter case, it was stated she was not present, and the Court held the variance to be fatal to a conviction, and observed in closing their opinion, "the defendant might be entrapped, if it could be held, that the facts found in the latter (the special verdict) would support the charge in the indictment."

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF W. B. LENOIR v. ELI SOUTH.

The actual possession, under color of title, for seven years, though of a very small portion of the land and that in the midst of the woods, will confer the title on the possessor of the whole tract covered by his grant, there being no actual possession of any other part by another person.

In an ejectment the jury may find the precise interest of the lessor of the plaintiff, and find the defendant guilty as to that, and judgment shall be entered accordingly.

A plaintiff may appeal from a judgment in his own favor.

The cases of *Green* v. *Harman*, 4 Dev., 158; *Carson* v. *Burnet*, 1 Dev. & Bat., 546; *Godfrey* v. *Carlwright*, 4 Dev., 487; *Love* v. *Wellborn*, 5 Ired., 444; and *Holdfast* v. *Shepard*, 9 Ire., 223, cited and approved.

Appeal from the Superior Court of Law of ASHE County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This action was commenced on the 7th of December, 1847. The plaintiff showed a title to the premises by an old grant to his lessor. As to half an acre, the defendant admitted himself to be in possession without color of title, and submitted to a verdict. The residue of the land in the defendant's possession consisted of two adjoining tracts of 100 acres each, and, in respect thereto, he relied on the statute of limitations. In support of his defense, the defendant gave in evidence two grants to himself for those two tracts, issued twenty years before the trial; and he also offered evidence, that, in the spring of 1841, he claimed the land covered by his grants and cleared a small piece of land, about three rods square, on the line between his two tracts, and including a part of each, and enclosed it by felling four trees around it and throwing branches and brushwood on them; and that he planted potatoes therein, cultivated and gathered them in 1840, and further, that, in the spring of 1841, he again planted the same acre

in potatoes and cultivated them, but that pigs got in and rooted them nearly all up, so that there were in autumn but a few vines to be seen, and a few stalks of corn, which seemed to have been worked; that, in 1842, he enlarged the clearing to three acres, embracing about equal parts of both tracts, and fenced it and planted a crop of corn therein that year and every year afterwards to 1847, inclusive, and cultivated and gathered the crops. On the part of the plaintiff, evidence was then given, that the defendant's field or enclosure, was surrounded by woods and was three-quarters of a mile from the defendant's dwelling, which was nearer than any other; and that the land was situate in a mountainous region, where there were but few inhabitants. The plaintiff also gave evidence, that, eight or nine years before the bringing of this suit, his lessor surveyed the land claimed by him, and, on that occasion, made blazes on several trees near his lines, and that the defendant defaced those marks on some of the trees, and felled others of the trees; and that he requested a witness not to give the lessor of the plaintiff information of a certain tree, as it would enable him to identify his land and injure the defendant.

The counsel for the plaintiff insisted, that the defendant's possession was so minute and detached, as not to conform to the usages of agriculture, nor exhibit the requisite notoriety; and that a possession, thus apparently clandestine and contrived for concealment, was fraudulent and ought not to bar the entry of the true owner, and moved the court so to instruct the jury. His Honor declined giving an instruction in the terms asked, but charged the jury as follows: that if they should find from the evidence, that the defendant had been in the continuous adverse possession of the land, covered by the two grants to him, for seven years before the suit was brought,

the plaintiff could not recover; that to constitute such adverse possession, it must be open and not clandestine, such as is consistent with the usages of agriculture in sowing the land and reaping the fruits; that the failure to gather the crop of potatoes planted in 1841 would not amount to an abandonment of the possession, if they believed the testimony which had accounted for it; that it would not deprive the defendant of the benefit of his possession, (if they should find that it had been taken under his grant and continued on that claim for seven years,) even should they believe, that the defendant knew, from the beginning, that the land belonged to the lessor of the plaintiff; and that it was sufficient to prevent the defendant's possession from being considered clandestine and to constitute an open and adverse one, if it was to such an extent and of such a character, that the public generally might have known it, and some of his neighbors did know it, although some others of them did not see it.

The jury found the defendant guilty as to the half acre, and not guilty as to the 200 acres included in the defendant's grants. For the plaintiff it was moved, that the verdict should be entered generally, but the court directed the verdict to be recorded as it had been given in; and from a judgment accordingly the plaintiff appealed.

*Lenoir* and *Avery*, for the plaintiff.
*Craige*, for the defendant.

RUFFIN, C. J. It may seem, at first view, a hardship on the owner of the wild land, situate as this is, and perhaps at a distance from him, to lose his title by reason of a possession, of which he, probably, would not, and here, certainly, had not early knowledge. But the law cannot suppose, that an owner will not look to the condition of his property, at least so far as to discover an intruder within

the period of seven years, and take the necessary steps to assert his own right; and therefore an omission to do so must amount to the *laches*, for which the law deprives him of his entry and vests the title in the possessor. It follows from these observations, that the instructions given to the jury were as favorable to the plaintiff, as they could well be. Indeed, it is not easy to comprehend, what is meant by a clandestine possession of seven years. One may enter clandestinely or by a trick; but when he is once in and continues there, claiming to hold the land as his own, the possession, it would seem, cannot, in its nature, be secret, but is necessarily visible. The furthest the Court has gone, in laying down a doctrine at all applicable to this question, was in *Green* v. *Harman*, 4 Dev., 158, in which case it was mentioned with some hesitation, that, if a defendant run his fence so near the line between him and the lessor of the plaintiff, as to induce the jury to believe that it was a mistake merely, or that the lessor of the plaintiff, though reasonably diligent, might so have thought it and have mistaken the character of the possession, and thought the other party did not intend to usurp a possession of a part of the land belonging to him, then such a possession might be considered as permissive and not adverse. But it was put distinctly on the ground, that the defendant had a good title to the land adjoining the plaintiff's, and that the fence was the enclosure around it, and that in building it but slight encroachments were made over the line on the land of the plaintiff; and it was expressly said, that, if he had not had a good title to the field adjoining, his entry on the land of the plaintiff would be distinct notice and could not be deceptive. For there is in that last case the possession in fact and nothing to mislead as to its character. Such is precisely the state of the present case. There can be no question of the object of the defendant in taking possession, nor of its character through-

out that it was adverse. It is plain indeed, that he hoped the lessor of the plaintiff would neither see it nor be informed of it, until it should ripen his title. But that can make no difference; for, in its nature, the defense of the statute of limitations is a protection against the title, and it has never been held, that the possessor must give notice of his claim, otherwise than by that most effective notice to an owner of ordinary vigilance, namely, the possession itself. As that existed in fact and spoke for itself, so that the lessor of the plaintiff could not have been mistaken, either as to the fact of possession or its character, if he had gone to the place or otherwise had kept due oversight of his land, there is no ground, on which the operation of the statute can be impeded. For, there is no doubt that the possession of the defendant was, from the beginning, such as made him liable to an ejectment; and, if so, that determines the question. No one will question, that he must have been so liable, to the extent of his enclosures from time to time. Then it follows, according to the settled rule in this state, that his possession of those parts was the possession of the whole covered by his patents, as the lessor of the plaintiff had no actual possession within those bounds. *Carson* v. *Burnet*, 1 Dev. & Bat., 546; which rule is the necessary consequence of our doctrine of color of title, and of the condition of our country in being still mostly in woods. His Honor therefore certainly did not err in leaving this case to the jury as one in which they might find an adverse possession in the defendants, extending to the whole of the two tracts claimed by him. The Court also holds that the verdict was properly recorded as delivered by the jury, because, first, it was so delivered; and, secondly, it was the most proper form for it. The jury may indeed give a general verdict, and, it is usual to to do so; but where the precise interest of the lessor or lessors of the plaintiff appears, it is generally proper and

most for the convenience of the parties, that the verdict should be according to it, *Godfrey* v. *Cartwright*, 4 Dev., 487; *Love* v. *Welborne*, 5 Ire., 344; *Holdfast* v. *Shepard*, 9 Ire., 223; *McAstor* v. *Porter*, 6 Peters, 205.

It seems proper to notice an objection taken in this Court, that a plaintiff could not appeal from a judgment in his own favor; as we have no doubt he may. The inquiry to him is of the same nature, whether the error be in not giving him all or a part of what he is entitled to; and he has a right to the judgment of this Court, whether he ought not to have had a verdict and judgment for all he claimed instead of the small part he got. Hence it is settled at common law, that a plaintiff may bring a writ of error on his own judgment, and so he may have his appeal under the statute.

PER CURIAM. Judgment affirmed, with costs against the plaintiff in this Court.

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THE STATE to the use of N. G. HOWELL v. P. W. EDWARDS, et al.

The reputation of the insolvency of a defendant in an execution will not excuse the officer, who has it, from liability for neglect of duty in not endeavoring to ascertain for himself, whether there is property or not, subject to the execution.

The case of *Parkes* v. *Alexander*, 7 Ire., 412, cited and approved.

Appeal from the Superior Court of Law of MACON County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding.

The action is on the bond given by the defendant Edwards, as a constable in Haywood county; and the breach was, for not diligently endeavoring to collect the sum due on a justice's judgment against Thomas Noland, which was put into his hands by the relator for collection. On the part of the relator evidence was given, that Noland lived in the county and was in possession of, and used as his own, two horses, some cattle, corn and other things. On the part of the defendants, evidence was given, that one Duncan had a mortgage on some of the effects in Noland's, possession, and that Noland lived in a remote part of the county from Edwards, and was generally reputed to be insolvent, and that he frequently told officers that he had no property of his own. The relator then gave evidence that Duncan's mortgage had been satisfied, and that, while Edwards had the relator's judgment in his hands, Duncan informed him, Edwards, that his mortgage was discharged, and that the goods were Noland's. The court instructed the jury, that if Noland had no property subject to execution, they ought to find for the defendant, but that if he had property, liable for the debt, the constable would not be excused for not endeavoring to collect it by the reputation of Noland's insolvency, but he ought to shew likewise, that he had endeavored to obtain satisfaction by taking out execution and securing the property if he could, or going to the debtor's house, or making enquiries for the property, for that purpose. Verdict and judgment for the plaintiff, and the defendants appealed.

*Edney* and *Baxter*, for the plaintiff.

*J. W. Woodfin*, *N. W. Woodfin* and *Fitzgerald*, for the defendants.

RUFFIN, C. J. If the constable would be liable for a false return on these facts, he must likewise be liable

under the statute, for want of due diligence in not taking out an execution, or otherwise making the money. The court holds clearly, that he would have been liable for returning *nulla bona* in this case, if a *fieri facias* had been in his hands. The return would have been false in point of fact, as Noland had property. Then, he was not to wait for a communication from the creditor, as to the person or residence of the debtor, or the particular property in his possession. If he needed information on those points, it was his duty to make inquiry before he ventured on a return, false in fact. *Parkes* v. *Alexander*, 7 Ire., 412. *Dyke* v. *Duke*, 4 Bing. N. C., 197. But here it is not pretended, that the constable did not know the debtor and his residence, and there was evidence that he had precise notice from the mortgagee of some of the effects, that his claim was discharged and that the property then belonged to Noland, and, of course, was subject to execution. No reputation of insolvency of the debtor could excuse such indifference to the interests of the creditor and gross neglect of duty.

PER CURIAM. Judgment affirmed.

C. E. GRAHAM v. WILLIAM DAVIDSON.

A. in 1825, made a parol gift of a negro man to her grandson B. B's. father took him into his possession at that time and kept him till 1841, when he conveyed him and other negroes by deed of gift to his said son and delivered him to B. In 1840, the grandmother's husband (she having been married a second time) demanded the negro man of the father, who refused to deliver him. B. kept the negro from 1841 to 1846, treating him as his own. In 1843, B. requested permission of his grandmother to sell the negro, which was refused; *Held*, that B.'s possession, under those circumstances for five years, even with a constant claim of title, could not divest the right of his grandmother's husband.

The case of *Green* v. *Harris*, 210, cited and approved.

Appeal from the Superior Court of Law of LINCOLN County, at the Special Term in July, 1849, his Honor, Judge *Dick*, presiding.

This is an action of replevin for a slave, named Cato, which was commenced in March, 1849, and in which the defendant pleaded property in one Thomas Byers. The plaintiff gave evidence, that the slave once belonged to his grandmother, now the wife of Byers, and that, about the year 1825, she gave him to the plaintiff, and that John D. Graham, the father of the plaintiff, had the negro in his possession from that time up to the 11th of December, 1841, when he delivered him and a number of other negroes to the plaintiff, and also made him a deed of gift for them, which was proved and registered in March, 1848. The plaintiff further gave evidence, that, on the 20th of May, 1840, Thomas Byers went to the house of John D. Graham and demanded of him the negro Cato, and that John D Graham, who then had the negro in his posses-

sion, refused to deliver him to Byers, and, on the 25th of the same month, wrote a letter to Byers demanding a negro woman, the mother of said Cato, and named Doll, as his property, and requested him to deliver her to the bearer of the letter, and therein added that "as to her son Cato, he is my property and has been claimed as such these 14 or 15 years. I shall retain therefore, and leave you to pursue what course you deem best." And that Byers then said, "I have no negro of John D. Graham's, and shall have nothing to do with it." The plaintiff farther gave evidence, that he took the slave Cato into his actual possession, on the 11th of December, 1841, and so kept him and used and treated him as his own, up to the 27th day of December, 1846; and that, on the latter day, the defendant took him into his possession, and on the next day the plaintiff demanded him and the defendant refused to deliver the slave, saying that he was his own.

The defendant gave evidence, that, in the summer of 1843, the plaintiff requested his grandmother, Mrs. Byers, to allow him to sell Cato; and that Mrs. Byers, who was present, said, "no; and if you are tired of Cato, send him home"—to which the plaintiff replied "very well." And the defendant also gave evidence, that, the day after the defendant took the negro, the plaintiff mentioned to one Allen, that Cato was gone, and he expected Davidson had him; that Allen then asked the plaintiff, if he had not a good title to the slave Cato, and that the plaintiff replied, "I have a deed of gift from my father, but he had no title to Cato."

The counsel for the defendant insisted to the jury, upon the evidence of the plaintiff's application to Mr. and Mrs. Byers for leave to sell the negro, and of his admission that he had no title under his father's deed of gift, that the plaintiff did not claim under his father, but considered himself as holding under gift of Mrs. Byers; and prayed the court to instruct the jury, that, if they should so believe, they

should find for the defendant. The court refused to give the instructions prayed for; and directed them, that, if they believed Byers demanded the negro, Cato, from John D. Graham on the 20th of May, 1840, and that he, John D. Graham, then refused to deliver him up, and also, on the 25th of May following, informed Byers by letter, that he claimed the negro as his own, then the statute of limitation began to run from the 25th of May, 1840, and the title of John D. Graham, or of one claiming under him, would ripen into a perfect title, in three years from that time—provided John D. Graham and the plaintiff, claiming under him, had kept the adverse possession of the slave during that time; and here it was proved that they had the exclusive possession from the 20th of May, 1840, until the 27th of December, 1846. And that, if the plaintiff's title had become perfect in three years from the 25th of May, 1840, the expressions of the plaintiff to Mr. and Mrs. Byers, and to the witness, Allen, would not divest him.

*Boyden*, *Guion* and *Johnson*, for the plaintiff.

*Craige*, *Alexander* and *Bynum*, for the defendant.

RUFFIN, C. J. Although it does not expressly appear, it must be understood from the manner in which the case is stated, that the gift of Cato from his grandmother to the plaintiff was by parol, and that the delivery was to the father for the plaintiff, then an infant probably. Such being the case, it may, at the least, be a question, whether the plaintiff could make a title under the statute of limitations, supposing him to have claimed under the conveyance from his father, unless something more appeared in the case than now does. For, although the statute began to run in May, 1840, in bar of an action against John D. Graham for his refusal to give the negro up to Byers, and although it be farther admitted, that, if he had

retained, the possession for three years after his refusal, Byers might also have been barred of his right to take or recover the negro, yet the result may be different, where he did not retain the slave for that period, but within it delivered him to the donee of Byers, who accepted him, and for anything now to be seen did not hold him otherwise than as Byers had done, as far as he made known to Byers. In such a case, it is worthy of consideration, whether Byers has not a right to treat a delivery to his donee, as a delivery to himself, as the donee is his bailee; unless the latter distinctly apprise the donor, that he denies his title and holds for himself, as by a refusal to restore the possession or a wrongful disposition of the property. *Green* v. *Harris*, 3 Ire., 311. It is true Byers might have sued John D. Graham at any time within three years after the demand. But where the negro was delivered to the son, he had no motive to sue the father, unless the son should deny his right as the father had done, and if he had done so, then, no doubt, the statute would run against him in favor of the plaintiff, because then he would have an action against the son, as well as the father. In demanding the negro, then, it may have been the very purpose of Byers, finding that John D. Graham claimed the negro as his own property, to get him for the plaintiff, and when the father afterwards delivered him to his son, Byers might have considered his purpose answered, and for that reason rested satisfied. For, it is not stated, he even knew, that the father had undertaken to convey the negro to the plaintiff, as of his own gift, and much less that the plaintiff made known to him, that he claimed the negro as his own, under a deed of gift from his father, and not under the parol gift of his grandmother. Could Byers have brought trover against the present plaintiff, merely upon his taking possession of the negro, and without a demand and refusal, when in the very stating of his title it would appear, that he had given the negro to him verbally?

Would it have been sufficient for him to shew, in support of that action, that the plaintiff's father had refused to deliver the negro on demand, without shewing further that the plaintiff likewise denied his title and set him at defiance? If it would not, then Byers never had a cause of action against the plaintiff, and, therefore, it would seem, ought not to be barred by the statute, but might claim the slave, since the title had not vested in John D. Graham, at the time he parted from the possession to his son. But however that may be, as it is not necessary to the present case, we do not propose to decide the point. It is perfectly clear, that, if the plaintiff, although he took a deed of gift from his father, including this with other negroes, did not in fact assert a title under that deed, but took the negro under the gift from his grandmother, then *his* possession would not be adverse to Byers; and therefore there would not be three years' possession of that character, and Byers would not be barred. It was upon that hypothesis the instructions asked by the defendant proceeded, and we think they ought to have been given. For although the subsequent declarations of the plaintiff would not *proprio vigore* vest a good title in him, as in the nature of a conveyance, yet, those declarations were material to show, that the plaintiff rested upon his having had an adverse possession; which was assumed, because he came in under his father, who had made his possession adverse by an assertion of title. That consequence would ordinarily follow; and it might follow in this case, also, upon the presumption, that the plaintiff claimed as his father did, unless it should be rebutted by the nature of the plaintiff's title as donee of Byers, or unless it should appear upon evidence, that, in truth and fact, the plaintiff did not set up the adverse title, but, being conscious of its defect, abandoned it and held under his grandmother. Now his acknowledgment, at any time, of the manner in

which he had held, or then held, was evidence to the jury, upon which they might find that his possession was not adverse to his grandmother, but was under her. It was therefore, at all events, erroneous to assume in the instructions to the jury, that the possession of the plaintiff was adverse, in opposition to his admission of the grandmother's title, implied by the declarations proved on the part of the defendant, if credited. It ought, at least, to have been left to the jury on that evidence, whether the plaintiff took the negro and held him under the gift from his grandmother, with instructions, that, if he did, his possession had not been adverse to her or her husband, and therefore that he had no title against the latter. Upon this last ground the Court holds the judgment to be erroneous, and that it must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly

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LETHEA CALL v. JEREMIAH B. ELLIS, et al.

An adverse possession of a slave for three years confers on the possessor a complete title to the slave.

The case of *Powell* v. *Powell*, 1 Dev. and Bat. Eq., 380, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

The following is the case sent up by the judge below:

This was an action of trover, brought to recover damages for the conversion of a negro by the name of

Louisa. The plaintiff proved, that she had had the possession and control of the negro in controversy from the 1st day of March, 1843, until she was taken off by the defendants on the 1st day of December, 1846. At the time she was taken off by the defendants, she was at the house of a man by the name of Gibbs, to whom the plaintiff had hired her for two or three days to assist him in his business. After night, the defendant went to the house of Gibbs and inquired for the girl, alleging that the defendant, March, had purchased her from the other defendant, Ellis. The negro was called up, and Gibbs stated that he would send for the plaintiff, and she would permit them to take her or not, as she might think proper. The defendants said they were in a hurry to start. Gibbs, however, sent for the plaintiff, who arrived in the course of an hour or two, but before the defendants had taken possession of the negro. When the plaintiff came, she objected to their taking her, and took the negro by the hand. The defendants took her from the plaintiff and carried her off. The plaintiff proved the value of the slave.

The defendants offered in evidence a bill of sale from the plaintiff to the defendant, Ellis, dated the 10th of February, 1841, by which the negro in controversy was conveyed by the plaintiff to the defendant, Ellis. It was proved that the negro went into the possession of Ellis, about the time of the date of the bill of sale, and continued in his possession until the 1st of March, 1843, when she went into the possession of the plaintiff. The plaintiff, from that time, either kept her working on the plantation, on which she lived, or hired her out. The day after the negro went into the possession of the plaintiff, she sent after her clothes, and Ellis delivered them up. The plaintiff also proved, that, shortly before she made the conveyance to Ellis, she owed debts to the amount of $40 or $50,

the payment of which was about to be enforced by process of law. Ellis proposed to the plaintiff's son, that he would assume the payment of these debts, and, as a means of re-imbursing himself, would hire the negro Louisa at the rate of $5 per month, until her hire amounted to enough to pay him what he should advance for the plaintiff. Shortly after this, the son of the plaintiff, hearing that Ellis had a bill of sale for Louisa, called upon him and inquired if such was the fact. Ellis stated to him, that he had no bill of sale for Louisa, but merely a strip of paper to show that he had hired her. Another witness stated, that, in the fall of 1842, or the spring of 1843, Ellis informed him that he had not purchased, but had merely hired, Louisa, at $5 per month, and that she had nearly worked out the time—that he should like to purchase her, but could not afford to pay the price. The officers, who had for collection the claims, which the plaintiff owed, stated that in 1840 or 1841, Ellis called upon them and informed them, that he had agreed to befriend the plaintiff, and that he would assume the debts, which he had to collect from the plaintiff, provided they would allow him a little time to raise the money. Ellis promised to pay them at the ensuing county court, and did then pay them. Another witness stated, that he lived in the family of Ellis, while he had Louisa in his possession, and, on one occasion, Ellis remarked to his wife, that he had hired Louisa and she should do what he wanted her to do.

The defendants introduced a witness, who stated, that he had a claim to collect from the plaintiff, and he went with an execution, intending to make a levy upon the slave Louisa; that he informed the plaintiff of his business, and inquired of her, if the defendant, Ellis, had a bill of sale for the negro. She answered that he had. This conversation took place on the 5th of December, 1843. Another witness was present, who stated the conversation in nearly the same way.

It was in evidence, that the plaintiff was so illiterate as not to be able to read or write. Much evidence was offered by the plaintiff to prove, that an imposition was practiced upon her, at the time she executed the bill of sale to Ellis, which it is unnecessary to state.

A motion was made to nonsuit the plaintiff, because, at the time the defendants took the negro, she did not have the right of immediate possession.

The jury were instructed, that, as the witness Gibbs hired the negro by parol, it would be for them to find what were the terms of the contract of hiring. If the negro was to work only that portion of the day, that is usually employed in work, and at night return home to the plaintiff, or if they inferred from what took place, when the defendants went there to take the negro, that Gibbs surrendered the possession or the right of possession to the plaintiff, the action could be maintained. If, however, at the time the defendants took possession of the negro, the plaintiff then had not the right of immediate possession, the action could not be maintained. The court further instructed the jury, that, though the conveyance from the plaintiff to Ellis was valid, if the plaintiff had more than three years adverse possession of the negro, previously to the conversion by the defendants, she would be entitled to recover; and what was the character of her possession was a fact for the jury to ascertain from the evidence. The court further instructed the jury, that, if the conveyance of the negro, though absolute on its face, was really intended by the parties to it, as a security for the money which Ellis had advanced for the plaintiff, and, after being repaid that amount, by the hire of the negro or otherwise, he surrendered her again to the plaintiff, according to the terms of their original contract, it would be evidence, from which the jury might infer a parol sale and delivery of the negro from Ellis to the plaintiff.

There was a verdict for the plaintiff and from the judgment thereon the defendants appealed.

*Clarke* and *Boyden*, for the plaintiff.

*Osborne* and *Craige*, for the defendants.

NASH, J. The instructions given to the jury were correct, on all the points embraced in his Honor's charge. The action was in trover for the conversion of a negro woman named Louisa. After the testimony was closed, a motion was made in behalf of the defendants, that the plaintiff should be called, because, at the time the defendants took the negro, she, the plaintiff, did not have the right of immediate possession. In other words, that the court should so instruct the jury. This was properly refused. Whether the plaintiff was or was not entitled to the immediate possession of the slave, depended upon the facts to which the jury alone were competent to answer. Louisa had been hired by the plaintiff to a man by the name of Gibbs, for a few days, at whose house she was when the defendants came after her. Gibbs, not being willing they should take her in the absence of the plaintiff, stated, he would send for her, and she would permit them to take her or not, as she thought proper. Upon her arrival and being informed of their purpose, she refused and took Louisa by the hand. The defendants took her from the plaintiff and carried her off. The question as to the plaintiff's right of immediate possession depended upon the fact, whether Gibbs had parted with his possession. The jury were instructed, that, if the evidence satisfied them, that Gibbs had surrendered his possession to the plaintiff, before the defendants took the negro, she could maintain the action. The instruction was given in answer to the motion. The hiring by Gibbs was for no definite period of time, and, if it had been, he might, with the consent of the plaintiff, have put an end to the contract

and surrendered the possession at any time before the expiration of the period for which he was to have her. The court committed no error in refusing the motion or in the instruction given.

The jury were further instructed, that, although the conveyance from the plaintiff to the defendant, Ellis, was valid, if the plaintiff had had adverse possession of the negro for more than three years, previous to the conversion, she would be entitled to recover. Whether the plaintiff's possession from the 1st of March, 1843, to the 1st of December, 1846, was adverse or not, was left to the jury, as a matter of fact. There can be no doubt of the correctness of this portion of the charge. The statute of 1820, Rev. St , ch. 65, sec. 18, does not bar merely the action after three years, adverse possession, but confers the title. So that such possession is not only a full answer to an action, but it is in itself a complete title to support an action, either to recover the property specifically, or damages for a conversion, or a trespass. It is similar in its operation to a seven years' adverse possession of land, under color of title, under the act of 1715, except, that the possession of slaves need not be accompanied with any color of title. *Powell* v. *Powell*, 1 Dev. & Bat. Eq., 380.

In the last instruction no error is perceived. The bill of sale to the defendant, Ellis, bore date in February, 1841, and he remained in possession of the negro until the 1st of March, 1843, when she returned into the possession of the defendant, and so remained until the 1st of December, 1846, three years and nine months, working on her plantation, and, upon the application of the plaintiff, Ellis, sent her clothes to her. From this fact and the others set out in the case, the jury were instructed, they were at liberty to presume a parol sale and delivery by Ellis to the plaintiff. This instruction was perhaps not necessary, as the whole question as to the plaintiff's title was embraced in that given upon the operation of the three

years' adverse possession of the plaintiff. There is however no error in law in it.

PER CURIAM. Judgment affirmed.

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DOE ON THE DEMISE OF MARTIN ICEHOUR v. WILLIAM RIVES.

Where, on the trial of an ejectment, it appeared that one of the corner trees could not now be found, running the course and distance called for, but it was proved that many years ago a former owner of the land declared that a stump in a certain pond was his corner; *Held*, that the court below did not err in instructing the jury that if this tree had been marked as a corner, at the time of the original survey, then it would control the course and distance; but, if subsequently marked, because the owner could not find the corner originally marked, then the course and distance would not be controlled by it.

The cases of *Reed* v. *Schenck*, 3 Dev., 65, and *McNeil* v. *Massey*, 3 Hawks., 91, cited and approved.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Fall Term, 1847, His Honor, Judge *Pearson*, presiding.

The following case was sent up by the judge below:

On the trial of this action of ejectment, the defendant admitted himself in possession, and it was admitted that the defendant's title papers covered the land in dispute. It was also admitted, that the lessor of the plaintiff had the oldest title, and the only question was, whether his title covered the land in dispute.

The deed of the plaintiff's lessor began at a white oak, then 5 degrees 55 east 96 poles to a white oak, then 5 degrees 11 east to a black oak, &c. The beginning white oak and the third corner black oak were admitted, and, if the first line extended to the end of the 96 poles, it was admitted that a line to the third corner black oak would take the land in dispute. No corner tree was found at the end of 96 poles, and the defendant endeavored to control the distance and stop the first line at the end of 57 poles, near a small pond, and it was admitted that if the line stopped in or near the pond, instead of extending the 96 poles, then a line to the third corner black oak would not take in the land in dispute. The defendant called on one Boyd, who swore that in 1788 he was a boy, when Wilson, under whom the lessor claims, was surveying the land—that Polk, under whom the defendant claims, was also along—that they commenced at the beginning white oak and ran along the first line to a small pond, when one Thomas Beatty, who was with them, and who is now dead, pointed out a stump in the pond, and said, "that stump was made a corner by me and Polk." Wilson made no objection, and the surveyor then turned and ran from the stump to the black oak. Boyd said there were no marks on the stump, nor did he understand that there were any marks on the tree before it was cut down; but the stump was fixed on as a corner, long after the original survey, when it was ascertained that the corner tree called for could not be found. One Taylor swore that several years before this controversy arose, Moses Beatty, who is now dead, shewed him a stump in the pond, and told him he had heard both Wilson and Polk say, more than forty years ago, that that stump was Wilson's corner. Several witnesses swore that one Samuel Wilson, who was one of the heirs of John Wilson, the person spoken of by the witness Boyd, and who is now dead, some fifteen years ago pointed out

the black oak as one of his father's corners, and, while the surveyor was running a straight line from the black oak to the pond, said "that was where his father's line ran." Other testimony was offered, which it is not necessary to state, as it would not alter the case.

The court charged that distance was to be observed, unless there was some more certain description to control it; that if the jury were satisfied that, at the time of the original survey, a tree, standing in or near the pond, was marked as a corner, that would control the distance and cause it to stop short of the 96 poles. But, if the jury came to the conclusion that no tree was marked in or near the pond, at the time of the original survey, and that the testimony offered merely established the fact that, after the original survey, the parties, who became entitled to the land, not being able to find a corner, fixed on a stump and agreed that it should be a corner, that fact would not be sufficient to control the distance called for in the lessor's deed, and the plaintiff would have a right to go to the end of the 96 poles.

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

*Osborne*, for the plaintiff.
*Thompson* and *Wilson*, for the defendant.

RUFFIN, C. J. The Court holds the instructions to the jury were right, for the reasons assigned in the superior court, and according to the case, *Reed* v. *Schenck*, 3 Dev., 45. At first it seemed that, after so long a reputation as to the corner and lines, founded upon the repeated declarations of the owners near the time of the survey and patent, the jury might, and perhaps ought, upon the strength of it, to have found that in fact the corner tree did stand in the pond, and that there was a mistake in the call for course and distance. The cause might, indeed,

have been put to the jury with express directions, that they might act on those declarations and reputation of the corner tree, as evidence, that it was originally, in fact, as contended for by the defendant, upon the principle laid down in *McNeil* v. *Massey*, 3 Hawks., 91. But, in truth, the question was left to the jury in that manner, though their action was not, perhaps, called so distinctly to the force of the evidence, as it might have been. Yet the evidence was left to them, and the point, where the corner really stood, or whether there was any mistake in making it, was one of fact, and proper for the jury; and it was not erroneous to submit the point, with the evidence, without more particular instructions than those given, when they were not requested.

PER CURIAM. Judgment affirmed.

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JAMES PERRY v. ELISHAH PHIPPS.

A person cannot kill a dog in the owner's house or yard, upon the pretense that he is a nuisance, because he had, at a former period, chased or bitten some one else.

When a man has been attacked by a dog on the owner's premises, but the dog is driven off by the family, so that the man is no longer in danger of being bitten, he is not justified in killing the dog, while the latter is running from him.

Appeal from the Superior Court of Law of ASHE County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

The action is trespass for killing a dog, the property of the plaintiff; and the pleas are, that the dog was a nuisance and that any person had a right to kill him, and that the defendant killed the dog in defending himself from an attack on him by the dog, and was obliged to kill him in order to prevent the dog from biting and worrying the defendant. On the trial, evidence was given, that the plaintiff and defendant were neighbors and in the habit of visiting each other; and that, upon a visit to the plaintiff's in the day-time, the defendant entered the plaintiff's yard, when the dog, being loose, attacked the defendant and would probably have bitten him, if he had not been prevented by two of the daughters of the plaintiff, who lived with him, called off the dog, and also beat him with a pole and drove him away; and that, after the dog had been so driven away and was going under a house in the yard, at the distance of ten steps from the defendant and the plaintiff's daughters, the defendant with a gun, which he brought with him, contrary to the request of the plaintiff's daughters, shot the dog and killed him. On the part of the defendant evidence was given, that a pathway passed through the defendant's land, near the house, along which persons frequently went to church and to mill, in order to cut off an angle in the public road, and that the dog was in the habit of attacking persons in the pathway. On the part of the defendant evidence was further offered, that, at three different times, the dog had attacked persons off the plaintiff's land; but the evidence was rejected.

The presiding judge instructed the jury, that the plaintiff had a right to keep the dog on his own premises, however fierce, unless he was a nuisance, and that there was no evidence that this dog was a nuisance, and that therefore the defendant was not justifiable in killing him, unless in defense of himself; and that, if the dog had retreated as stated, and was still retreating, the jury might

infer therefrom, that the defendant did not shoot the dog to protect himself. The jury found for the plaintiff, and from the judgment the defendant appealed.

*Boyden*, *Clarke* and *H. C. Jones*, for the plaintiff.

*Bynum* and *Craige*, for the defendant.

RUFFIN, C. J. We doubt not that a dog may be a nuisance, so as to authorize any person to kill him, as if he be mad and at large; for, in such a state, he is no longer *mansuetae naturae*, and the consequences of a bite from time to time, to either man or beast, may be so dreadful and so general, as to justify his destruction as soon as possible. But dogs are in many respects useful, and, with many persons favorite animals; and we are not aware, that fierceness, merely, and attempts to bite, or even the actual biting of one or more persons, have ever been held to empower another person, at a different time, to kill them, and especially to go to the owner's yard for that purpose. As a watch-dog his value is constituted by his being sharp and dauntless; and therefore it would seem those properties cannot, in themselves, convert him into a nuisance. Hence, the evidence rejected was irrelevant. If, indeed, the defendant had been bitten by the dog, it might have been proper to shew the savageness of the brute, and to insist, that the owner, if he had knowledge of his worrying people, ought to have confined him, so that he could not set on people passing, or bite a person lawfully going to the owner's house; and to that purpose his biting twice or even once has been held sufficient to make the owner liable, if he did not kill or confine the dog. Bul. N. P., 76, *Smith* v. *Pelah*, St. 1264. But here the question, as to that point, is entirely different; that is, whether a person can kill a dog in the owner's house or yard, upon the pretense, that he is a nuisance, because he a d at a former period chased or bitten some one else;

and we hold, that he cannot. Then, as to the second plea, the instructions appear to the court to be unexceptionable. A person is not bound to stand quietly and be bitten by a dog, nor to give him what might be called a fair fight among men. But if a fierce and vicious dog be allowed to go at large, and he runs at a person, as he lawfully gets to a house, or in passing along the road, apparently to set on the person, or, for example, on the horse he is riding, it seems but reasonable the person should protect himself from the injury of a bite to himself or his horse, by killing the dog; for, although a man has a right to keep a dog for the protection of his house and yard, yet he ought to keep him secured, and not let him loose and uncontrolled at such hours and in such places, as will endanger peaceable and honest people engaged in their lawful business. If therefore this dog were one of the kind supposed and the defendant had shot him, as he came at him, and when he had reasonable grounds to think, that the dog could not be restrained by the owner or his family, and would bite him, we should hold, that he did no more than he had a right to do. But when the plaintiff's family were at home, and, by their immediate interference and commands and punishment, governed and drove away the dog, so as not only to prevent him from biting the defendant at that time, but also to save the defendant from all danger then, by driving the dog away, the killing of the dog, after that, and against the urgent entreaties of the family, could have been only on the pretense, and not on the reality of protecting the defendant from an attack at that time, and the circumstances were properly left to the jury, as evidence on which they might find, that the defendant did not act on the defensive.

PER CURIAM. Judgment affirmed.

JOHN HOKE'S EXECUTORS v. SAMUEL FLEMING.

One of several executors may release a debt on demand due to the testator; it is not necessary that all should join.

When a witness is impeached by shewing that he has made contradictory statements, it is perfectly regular, in reply, to shew that he has made consistent statements.

A. made a contract with B. that he would place in the hands of a constable a large amount of promissory notes endorsed by A. to B., take the constable's receipt therefor and deliver it to B., upon which B. was to deliver to A. cotton yarn to the amount of the note. A., without placing notes in the constable's hands, fraudulently procured him to sign a receipt, as if notes had been given him for collection, and handed the receipt to B., whereupon B. delivered the cotton yarn according to the contract; *Held*, that B. might maintain an action against A., either in case in assumpsit or in case in tort, at his election.

The cases of *Johnson* v. *Patterson*, 2 Hawks, 183; *State* v. *George*. 8 Ire., 324, and *Draughan* v. *Bunting*, 9 Ire., 10, cited and approved.

Appeal from the Superior Court of Law of McDOWELL County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

This was an action of assumpsit, wherein the facts were found as follows: It was agreed between the plaintiff's testator and the defendant, (the one residing in Lincoln county and the other in the county of Yancey,) that promissory notes for cash were to be endorsed by the defendant to the testator, and placed by the defendant in the hands of a constable in Yancey for collection; and, upon the reception of the constable's receipts at the testator's cotton factory in Lincoln, he engaged to deliver to the defendant cotton yarns and domestic cloths at cash prices. The defendant then communicated to a constable, by the name of Chandler, his bargain with Hoke, and made an

engagement with him, by which the constable was to give his receipts to Fleming for the amount required. The receipts were accordingly given, copies of which are annexed, marked A. B. C., and the goods delivered by Hoke according to contract.

Upon the giving of the two first receipts, notes were endorsed and given to the constable, to the amount of about $700; the last was given without anything passing between them, and the whole arrangement made, by a common understanding between the constable and Fleming, to enable the latter to deceive Hoke and defraud him of his goods. It appeared also that Hoke had heretofore instituted a suit upon the official bond of the constable and his sureties, and obtained judgment against the constable alone, but was unable to get satisfaction of any part thereof. In the course of the trial, the plaintiff offered the constable Chandler as a witness. He was objected to on the ground of interest, and two of the executors, plaintiffs, being present, released him; the copy of the release (marked D) is annexed. His competency was still further resisted, on the ground that the executors (not being the whole number) could not make a release, but the objection was overruled and the witness admitted, being first examined upon his *voire dire* and disclaiming all interest. To impeach the credibility of Chandler's testimony, declarations of his, inconsistent therewith, were offered, and the plaintiff, in reply, offered to prove declarations of the same purport with his oath. This was objected to by the defendant, but admitted.

The defendant resisted the recovery, 1st, because the facts stated would not sustain the particular form of action adopted (assumpsit).

2nd. The release of the judgment in the action against Chandler and his sureties was a bar to the recovery in this.

The court gave instructions to the jury adverse to these positions of the defendant, and there was a verdict for the

plaintiff for the value due on the bills of goods delivered, after deducting the amount of endorsed notes placed in the hands of the constable according to contract.

A rule was moved on the ground of misdirection and of the admission of improper testimony, which was discharged. Judgment being rendered on the verdict, the defendant appealed.

The following are the copies referred to in the case, in words and figures, to-wit:

A.

Received of John Hoke, endorsed by Samuel Fleming, six hundred and ninety-two dollars and 17 cents, in cash notes, which I promise to collect or return, as an officer, this the 12th of January, 1840, which I promise to collect or return, January 16, 1840.

(Signed) A. E. CHANDLER, Con.

B.

Received of John Hoke, endorsed by Samuel Fleming, eight hundred and ninety-two dollars and thirty-seven cents in cash notes, to collect or return according to law, as an officer, this 12th January, 1840, which I promise to collect or return, January 16, 1840. $892.37.

(Signed) A. E. CHANDLER, Con.

C.

Received of Col. John Hoke, endorsed by Samuel Fleming, five hundred and eighty dollars and fifty-six cents, in cash notes due, and three hundred due this fall, but all drawing interest, which I promise to collect or return, as an officer, this 18th of March, 1840. $880.56.

(Signed)

A. E. CHANDLER, Con.

D.

Know all men by these presents that we, John F. Hoke and Lysander F. Childs, executors of the last will and testament of John Hoke, deceased, for and in consideration of one dollar to them paid by Alexander E. Chandler, and for divers other good causes and considerations them thereunto moving, have released, acquitted and discharged, and do hereby acquit, release and discharge the said A. E. Chandler of and from a judgment and every part thereof, recovered in Burke superior court of law against the said A. E. Chandler by the said John Hoke, deceased, in the name of the state of North Carolina, to the use of the said John Hoke, at the fall term, A. D. 1843, of the said superior court, and do hereby release and discharge the said Alberto of and from all further liability on account thereof; in witness whereof, we have hereunto set our hands and seals, this the 9th day of November, 1848.

(Signed)

J. F. HOKE, [SEAL.]
L. D. CHILDS, [SEAL.]

Witness, H. W. GUION.

*Guion* and *Edney*, for the plaintiffs.

*Bynum*, *Avery* and *N. W. Woodfin*, for the defendant.

PEARSON, J. We concur with his Honor upon all the questions raised by the exceptions of the defendant.

One executor may release: it is not necessary for all the executors to join. 1 Williams on Exts., 652. 8 E. C. L. R. 518.

When a witness is impeached by showing that he has made contradictory statements, it is perfectly regular, in reply, to show that he has made consistent statements. *Johnson* v. *Patterson*, 2 Hawks, 183; *State* v. *George*, 8 Ire., 324. The defendant agreed to endorse promissory notes

to the testator of the plaintiff, and put them in the hands of a constable, in the county of Yancey, and upon the reception of the receipts, the testator agreed to deliver to the defendant cotton yarn at cash prices. Afterwards, the defendant handed to the testator the receipts, signed by a constable of the county of Yancey, for a large amount. Upon the reception of those receipts, the testator delivered to the defendant cotton yarn in pursuance of the agreement. The breach of this contract assigned by the plaintiff is, that the defendant did not endorse promissory notes to the testator and did not put promissory notes so endorsed in the hands of the constable in the county, &c. His Honor instructed the jury, that an action on the case in assumpsit would lie for a breach of contract on the part of defendant. This seems to be a proposition so exceedingly plain, that we should have been at a loss to discern what grounds were relied on by the defendant, but for the very ingenious arguments of his counsel. The defendant endorsed a few notes to the testator, and put them in the hands of the constable, and procured the constable to execute three receipts, as for notes so endorsed, to a very large amount, and, by handing these receipts to the testator, was enabled to deceive him and defraud him of his goods. We think it clear that case in assumpsit or case in tort for the deceit would lie, at the election of the plaintiff, for this breach of contract, and fraud practiced under cover of the contract.

It is unnecessary to decide, whether an action for goods sold and delivered could be maintained, (treating the contract as repudiated,) inasmuch as some notes were endorsed and put in the hands of the constable; because very clearly an action can be maintained for a breach of the special contract, and the declaration has several counts upon the contract, as well as the general counts. The argument, that, because the receipts were genuine, and the testator had a right of action against the constable, there

was no breach of contract, is entirely fallacious. The substance of the contract was, that the defendant would endorse notes to the testator and put the notes so endorsed in the hands of the constable. The fact of taking a receipt was merely to give assurance to the testator, that the notes had been so endorsed and put into the hands of the constable for his benefit, and to be evidence against the constable, if the testator called for his notes and they were not delivered, or there was negligence in not collecting or a failure to pay over. The contract then was broken in the very *substance and marrow of it*, and was only complied with in its formal part of taking receipts, not for the benefit of the testator, but as the means of cheating him—a strange way of performing a contract which was to be the consideration for the testator's goods. The release executed to Chandler, if it had been properly pleaded, was no bar to a recovery in this action. The defendant had no cause to complain, if there was no such relation existing between him and Chandler, as to make the matter primarily liable to the plaintiff, and in fact the defendant had no cause of action for contribution, or otherwise, against Chandler, in respect of the amount of the notes purporting to have been received by him from the defendant, and which in truth *never were received*, and which omission formed the *gravamen* of this action; and, as the defendant had no cause of action against Chandler, in respect of notes, which he never received, it is difficult to conceive, why he should object to the release or have any concern with it. *Draughan* v. *Bunting*, 9 Ired., 10, the party had a right to contribution. The judgment below must be affirmed.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JAMES M. KERR v. ROBERT DAVIDSON.

A. conveyed to B. a tract of land by a deed absolute on its face, but intended merely as a security for money loaned, and B. gave a bond for the re-conveyance of the land, when the money was repaid; afterwards B. sold the land to C. for a full and valuable consideration, and then the creditors of A. sold the land by execution, and D. became the purchaser; *Held*, that D. only acquired the right of A., that is, the right to demand in equity a conveyance of the land from C., upon paying what remained due of the money loaned by B. to A.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Special Term, in November, 1846, his Honor, Judge *Pearson*, presiding.

This was ejectment. The defendant admitted himself to be in possession. Both parties claimed under one John Kerr. The plaintiff read in evidence a magistrate's judgment against the said Kerr, dated February, 1842, a levy under an execution issued January, 1843, an order of sale and *venditioni exponas* in 1844, and a sheriff's deed to the lessors dated February, 1845.

The defendant read in evidence a deed from the said John Kerr, to one James McKnitt Alexander, conveying the land sued for in fee-simple absolute, in consideration of $855, dated in 1820 and registered in 1826; also a deed from said Alexander to the defendant for the consideration of $2,850, which he proved was actually paid to the said Alexander. This deed was dated in 1843. The plaintiff called John Kerr. He swore that in 1820 he borrowed of Alexander $855; and agreed to make him an absolute deed for the land to secure the repayment of the

money and interest, and Alexander agreed to give him a bond to reconvey; that he got the money and made the deed, which had been read by the defendant, and Alexander executed to him a bond for the reconveyance. The loss of the bond was satisfactorily shown, and the witness allowed to speak of the contents. He further stated, that, when he made the deed, the land was worth $3,000, and he conveyed, merely to secure the repayment of $855; that he had retained possession since 1820, until he was put off in 1843 by the defendant treating it as his own, without ever paying rent; but he made several small payments towards the interest, on which occasions, Alexander would take up the old bond and give him a new one; that none of the bonds are registered. He had the lost bond proved, in order to be registered, after the defendant had purchased of Alexander, but the bond was lost. He further stated, that, before the defendant bought of Alexander, he called on the witness to see the land, and know the condition in which it stood. The witness told him, that Alexander held the title, to secure the repayment of borrowed money; that if he and the witness could agree upon the price, Alexander's money must be paid and the balance of the purchase-money be paid to the witness. Alexander could then take up his bond, and, between them, the defendant could get a clear title. He was not consulted by the defendant any further. The defendant's counsel moved the court, first, that being a *bona fide* purchaser for valuable consideration, he had a good title, even if he had notice of the bond held by Kerr before he purchased; secondly, that there was no sufficient notice of the nature of the conveyance, made by Kerr to Alexander, proven, and so he was a purchaser for valuable consideration without notice, even if a want of notice was necessary to protect him.

The court charged the jury, that, if the deed to Alexander, although absolute on its face, was in fact given to secure the repayment of money loaned, leaving a valuable interest in Kerr, as was shown by the bond and testimony of Kerr, then the conveyance was void, as to creditors, for want of registration; the registration of the deed not being sufficient, because that did not show the truth of the transaction, and that it was in fact a mere security: that Davidson, being a purchaser for valuable consideration, would acquire a good title and be protected, provided he could be placed in the light of a purchaser without notice, but that a want of notice, as well as a valuable consideration, was necessary: that, if the jury relied upon the testimony of Kerr, it was sufficient to shew what, in law, would amount to notice, or such information, as would put a man of ordinary prudence on his guard, and cause him to inquire.

The jury found for the plaintiff. A rule was moved for a new trial, because the court refused to charge as requested, and upon the following grounds: First, because it did not appear, that five days notice had been given to Kerr, the debtor in the execution, before the order of sale; secondly, because the levy was not sufficiently definite to identify the land; thirdly, because there was no endorsement on the execution, that it was levied on land for the want of goods and chattels, nor did it appear to have been shown to the county court, before the order of sale, that there were no goods and chattels. These last three objections were not taken, until after the trial and verdict, and, being objected to for that reason by the plaintiff's counsel, were not entertained by the court, especially as some explanation might have been offered by testimony, if the objections had been taken during the trial. Rule for new trial discharged. Judgment for the plaintiff; appeal by the defendant.

*Boyden*, for the plaintiff.

*Guion*, *Osborne*, *Alexander* and *Bynum*, for the defendant.

PEARSON, J. The conveyance from Kerr to Alexander, being absolute on its face, although in fact a mere security for the $850 lent, and not being registered so as to show, that it was a mere security, was, under the act of 1820, void against the creditors of Kerr and purchasers from him. The sale to Davidson, the defendant, being absolute and for full value, passed the title, although Davidson had notice, that there was a right of redemption outstanding in Kerr, subject to this right of redemption, which was a right in equity, and did not affect the legal title. Davidson became the owner of the land by his purchase. The lessors of the plaintiff by their purchase acquired the right to represent Kerr and call upon Davidson, in equity, to have the land, upon payment of the original sum lent and interest, or such part thereof as remained unpaid. The judge below misconceived the application of the act of 1840, chapter 28, which provides, that a volunteer or a purchaser for consideration shall hold the land against a subsequent purchaser for value, if such purchaser have notice of a previous voluntary conveyance. This case, however, does not fall within the provisions of that act, for here, Davidson, the defendant, is a purchaser for value from Alexander, and the lessors of the plaintiff are subsequent purchasers, not from Alexander, but from Kerr, and have therefore no right in a court of law, under the 13th or 27th of Eliz., or under the act of 1840, to impeach the title of Davidson, the defendant who, had, by payment of a full price, taken the title from Alexander, before they became creditors of Kerr, or, by their purchase made at sheriff's sale, acquired the right to represent creditors.

PER CURIAM. Judgment reversed.

PINCKNEY MORRISON v. JOHN RUSSELL.

An award must be signed by the arbitrator, and made known to the parties and delivered, before it can be admitted in evidence.

Appeal from the Superior Court of Law of CABARRUS County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding.

This is an action of assumpsit. The contract, upon which the plaintiff declared, was the following: The plaintiff purchased from the defendant a tract of land of 200 acres, at a certain price by the acre, and it was agreed at the time of the purchase that, if there should not be 400 acres in the tract, the defendant was to refund to him whatever the deficiency might amount to, at the rate at which the plaintiff was to pay for the land, and it was further stated, as a part of the contract, that, after the deed had been made for the land, the plaintiff had the land surveyed, and it was ascertained, that the tract consisted of a much less number of acres than that for which it was bought, of which the defendant was duly notified, and that the defendant agreed to refund at the rate at which the plaintiff had purchased the land. For the purpose of proving the contract set forth in the declaration, the plaintiff introduced a witness, who stated, that, at the time of the contract of sale, the legal title was in him, it having been previously conveyed to him by the defendant by a deed of trust; that both the plaintiff and defendant came to him, and stated that the defendant had sold the land to the plaintiff, as a tract of 200 acres, at $2,000. Before the deed was exe-

cuted, a survey was made of the land and it was ascertained to contain 212 acres, whereupon the witness refused to execute the deed, unless the plaintiff would agree to pay more than $2,000. After some conversation upon the subject, the witness stated, he would join with the defendant in a conveyance of the land, if the plaintiff would pay an additional sum. The plaintiff accordingly secured that amount to the satisfaction of the witness and the defendant, and they joined in a conveyance of the land to the plaintiff. This sale took place on the.....day of.....18—. In May, 1846, the plaintiff had the land surveyed by one Smith, who made out but 186¼ acres in the tract. The defendant had no notice of the time when this survey was made, but, after it had been made, the plaintiff informed him of the result of the survey and the defendant remarked that Smith's survey was not correct, as his compass did not work right. He also stated, that if the plaintiff would get another surveyor to run off the land, and it should be ascertained by him to be less than what he sold it for, he would pay him in money or land or give him the 19 acres, if that would satisfy him. The plaintiff proved, that, shortly after this, he did get the surveyor named by the defendant to survey the land, and gave notice to the defendant of the time the survey was to be made, but the defendant refused to attend. There is no evidence by what paper title this survey was made, nor was it proved that any person pointed out to the surveyor the lines by which the land was defined. Upon these facts, and it being proved that the surveyor was dead, the plaintiff offered in evidence the plot of the land purchased, which the surveyor had made, for the purpose of showing that the quantity of land was less than it was represented to be by the defendant. This evidence was rejected by the court. The plaintiff here closed his case, and the court, expressing the opinion that the plaintiff could not recover,

upon the evidence offered, the plaintiff, in submission thereto, suffered a nonsuit. Judgment and appeal.

*Osborne*, for the plaintiff.

*Wilson*, *H. C. Jones* and *Boyden*, for the defendant.

NASH, J. We concur with his Honor, that the plaintiff was not entitled to a verdict. There was a variance between the contract proved by the witness and that declared on. The contract declared on was, that the defendant sold to the plaintiff a tract of land, as containing two hundred acres at $10 per acre, and it was agreed, if, upon survey, it should turn out, that the tract did not contain two hundred acres, the defendant should refund whatever the difference might amount to, at the rate of which the plaintiff was to pay for the whole, and the conveyance was made. The contract proved was as follows: the defendant had conveyed the land in trust, and the trustee testified, that the parties came to him and stated, that the defendant had sold the tract to the plaintiff as containing two hundred acres, at the price of $2,000. Before the deed was made, a survey was had, and it was ascertained to contain two hundred and twelve acres, whereupon the witness refused to execute the deed unless the plaintiff would agree to pay more than two thousand dollars; whereupon it was agreed between the plaintiff and the defendant that the former should pay for the land $2,100—and the conveyance was made. These contracts are essentially different. One is for the sale of a tract of land containing two hundred acres at the price of $2,000; the other for the sale of a tract of land containing two hundred and twelve acres for the sum of $2,100; nor was there in the latter contract any agreement on the part of the defendant to refund any part of the price, upon the contingency that the tract should not contain two hundred and twelve acres. If the contract

declared on ever was made, it was certainly rescinded by the parties, and a new one made, different from it. The plaintiff further alleged, that, after the conveyance was made for the land, he ascertained by the survey that the tract did not contain two hundred and twelve acres, but only one hundred and eighty-six and one-quarter acres, which he communicated to the defendant, who promised, if he would get the land surveyed by a particular surveyor, and it should be ascertained, that the quantity of land was less than what he sold it for, he would pay him in land or money and give him the twelve acres, if that would satisfy him. If this was a valid contract, as founded on a sufficient consideration, it differed from both the others' and certainly did not support the declaration.

A question, however, has been made, as to the admissibility of the evidence offered by the plaintiff to show that the land was different in quantity. The surveyor selected to make the survey is dead, and a plot of the land, alleged to have been made by him, was offered in evidence and rejected by the court, and we think very properly. It had no feature of a paper, entitled to be regarded as evidence. It could not assume a higher character, than that of an award, which in fact and substance it was. But to make it available as such, it must be signed by the surveyor and made known to the parties. Until delivered, an award by the arbitrator may be altered. It is the delivery, which makes it final as to him. There is nothing to show, that the surveyor considered the plot as finished. We give an opinion on this point, as it is made in the case, and it may facilitate a future trial. Judgment affirmed.

PER CURIAM. Judgment affirmed.

## RULE.

THE FOLLOWING RULE WAS ADOPTED BY THE SUPREME COURT, AT MORGANTON, AT THE AUGUST TERM, 1849:

Ordered by the Court, that whenever a judgment at law is obtained by the plaintiff, it shall be at the option of the plaintiff's counsel, without a special motion to the Court, to have his execution for debt or damages returnable to the superior court of law of the county, from which the record was transmitted to this Court.

# CASES AT LAW,

ARGUED AND DETERMINED IN

# THE SUPREME COURT

OF

# NORTH CAROLINA,

## AT RALEIGH.

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## DECEMBER TERM, 1849.

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THE STATE to the use of JOHN WILLIAMS, Adm'r, &c. v. MIZELL'S ADM'R.

Where a verdict is rendered in the court below in favor of the plaintiff, he cannot, in the Supreme Court, suffer a nonsuit.

Appeal from the Superior Court of Law of BERTIE County, at the fall Term, 1849, his Honor, Judge *Bailey*, presiding.

The action is debt on an administration bond, suggesting breaches, and upon issues joined there was a verdict for the plaintiff and the damages assessed to $1,772.89. The relator, being dissatisfied with the amount of damages, moved for a new trial; but it was refused and judgment entered for the penalty of the bond to be discharged by the payment of the damages and costs, and thereupon the relator appealed. No bill of exceptions accompanies the record; nor is any error suggested in the judgment. But the counsel for the relator moved in this Court to be allowed to suffer a nonsuit.

*Bragg*, for the plaintiff.

*A. Moore* and *W. H. N. Smith*, for the defendant.

RUFFIN, C. J. The motion must, very clearly, be overruled. For, an appeal to this Court does not vacate the verdict, but it stands until it be adjudged here to be erroneous, and a *venire de novo* be ordered. While the verdict stands, of course there cannot be a nonsuit. Hence, the judgment must stand affirmed, with costs against the plaintiff in this Court.

PER CURIAM. Judgment accordingly.

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ASHEL SIKES v. ROBERT T. PAINE, et al.

In an action for a breach of a contract for the repairing of a vessel, in not making the repairs according to the contract, after the plaintiff had given evidence of the condition of the vessel after she was returned to him, it was competent for him to introduce witnesses of skill in such matters, to give their opinion upon the evidence first given, as to the difference in the value of the vessel as thus repaired, and what her value would have been if repaired according to the contract.

And it is not necessary that such witnesses should be regular ship-carpenters, if they have occasionally worked on vessels, owned and sailed in them for a long time and possess the requisite skill to enable them to judge.

The contract was to have the repairs effected by the 1st of June. The plaintiff did not apply for the vessel until the 5th of July and the repairs were not then finished; *Held*, that he was entitled to recover what the vessel would have earned in freight from the 1st of June until she was delivered, if that was a measure of damages.

The case of *Beverly* v. *Williams*, 4 Dev. & Bat., 236, cited and approved.

Appeal from the Superior Court of Law of TYRRELL County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

The defendant, on the 15th of February, 1847, entered into a written contract with the plaintiff to repair for him, at a stipulated price, a vessel—the work to be done in a workmanlike manner, and within all the month of May following. The work was not finished until the 17th of July. On the 5th of July the plaintiff went to Edenton, where the vessel was undergoing the repairs, for the purpose of receiving her. A witness, by the name of Hooker, proved, that neither the materials nor the work was such as the contract called for, and described minutely the deficiences. The plaintiff then called a witness, named Simmons, who stated, "he was not a ship-carpenter, but had worked in a ship a good part of a year and had owned vessels for many years; and that he was well acquainted with their value." He was then asked, "what, in his opinion, was the difference in value between such a vessel, as was stipulated for in the contract, and such an one as the witness, Hooker, had described this to be." Another witness was then called by the plaintiff to the same point. He stated, that "he was not a ship-carpenter, but had been the master of a vessel for some fifteen years, and had worked considerably in the repair of old vessels." He was then asked the same question as the witness Simmons. The testimony of both these witnesses was objected to by the defendant, but was admitted by the court.

*Heath*, for the plaintiff, submitted the following argument:

The witnesses, Simmons and Carvor, were both competent to testify as to the particular facts testified to: if "skill" were required, both had the requisite skill: both had worked on vessels: one had owned "many vessels," and the other had been for 23 years the master of a vessel; and it is submitted, that a man may become "skilled" in the construction, build, and material of a vessel, without his becoming a ship-carpenter.

The judge's charge, in relation to the damages, is right; the contract was for completing the work by the last of May *at farthest;* it was to be done, by a specific time, a day certain; and hence no demand was necessary; the plaintiff had a right to his vessel on that day: and not being then finished, was entitled to damages for longer detention.

*A. Moore*, for the defendants.

NASH, J. In the admission of this evidence, we perceive no error. In general, witnesses must speak to facts, and their opinions are not evidence. There are, however, exceptions to the rule. On questions of science, or trade, and others of a similar character, persons of skill are permitted to give their opinions in evidence. Medical men are suffered to give their opinion as to the state of a patient, whom they have seen; and they are often called on to listen to a description, given by other physicians, of the symptoms of a patient, whom they have not seen, and then to give their opinion. In the case of *Beckwith* v. *Sydebotham*, 1 Camp., 117, ship-carpenters were permitted to state their opinion of the sea-worthiness of a vessel from examining a survey, made by others, at which they were not present. In *Beverly* v. *Williams*, 4 Dev. & Bat., 236, a witness was permitted to give his belief, as to the identity of persons. In all these cases of science and skill, the opinion of the witness is admitted as evidence, upon the ground, that he is conversant with the business, to which he is called to testify, and has, therefore, peculiar knowledge concerning it. The court must first be satisfied from the examination of the witness himself, or of others, that he stands in that situation, which renders his opinion in the case evidence—the degree of weight, to which it is entitled, belongs exclusively to the jury. In the present case we think the evidence was competent. Neither of the wit-

nesses was a ship-carpenter, but one had worked part of a year in a ship-yard, and had been the owner of vessels for many years, and thought himself well acquainted with their value. The other "had been the owner of a vessel fifteen years, and had worked considerably in repairing old vessels." The court judged rightly in permitting the testimony to go to the jury to be judged of by them as to its importance.

It was insisted by the defendants, that, as the plaintiff did not call for the vessel until the 5th of July, he was entitled to recover only what she was worth from that time until the 17th, when she was delivered; and that interest upon the value was a matter of discretion with the jury. His Honor instructed the jury, that, as by the contract, the repairs were to be finished by the 1st of June, if she was not then ready, the plaintiff had a right to recover what the freight of the vessel was worth from that time until the 17th of July, when she was delivered, with interest, &c. We concur with his Honor as to the time, at which the plaintiff's right to recover damages commenced. The defendants were bound by their contract to have her ready on the first of June. She was not then ready, and at that time the contract was broken, and his right of action accrued. As to the interest, we give no opinion, as the plaintiff has remitted it, and moved that the judgment be affirmed upon the payment of the costs of this Court. The defendants do not except to the rule stated by the court, by which they were to be governed in assessing the plaintiff's damages, to-wit: the freight of the vessel, but to the time. This objection has already been noticed.

PER CURIAM. Judgment affirmed.

FLEMING BEASLEY v. SAMUEL S. DOWNEY.

Where a plaintiff charged a defendant, as his agent, with having received the hires of negroes, subsequent to November, 1840, and the defendant offered to prove that another person, as his agent, had received the hires prior to November, 1840; *Held*, that this evidence was irrelevant and properly rejected.

A deposition of a witness was taken on the 28th of December, 1847, on a notice served on the 26th of that month, under the act requiring three days' notice to be given, the party opposing the deposition appearing at the time of taking it and objecting to the length of notice, and declining to cross-examine; *Held*, that the deposition should be rejected.

One day, in such cases, is to be counted inclusive and the other exclusive.

Appeal from the Superior Court of Law of GRANVILLE County, at the June Special Term, 1849, his Honor, Judge *Settle*, presiding.

This was assumpsit for the hire of a negro from November, 1840, to March, 1843, during which time, and for some years before, the negro had been in the state of Mississippi under the control and management (as the plaintiff alleged) of the defendant.

The plaintiff admitted, that he had received the hire of the negro for the time prior to November, 1840; and, as evidence to charge the defendant, among other things, offered a letter of his, in which he uses these words: "those negroes have always been under my control and management, since they reached Mississippi." The letter is dated March, 1843.

The defendant alleged, that in the fall of 1841, his agency for the plaintiff ended, and one John A. Downey, a son of the defendant, then became the plaintiff's agent; and the defense was, that from that time the plaintiff's

cause of action, if he had one, was against the said John A. Downey, and not against the defendant.

To show this, and to explain the general admission above quoted, the defendant examined John A. Downey.

For the same purpose, he called Capt. Beasley, a brother of the plaintiff, and offered to prove, that, during part of the time the negro was in Mississippi, but prior to November, 1840, the witness had acted as the plaintiff's agent. Upon the statement of the witness, that he had acted under a letter of attorney, which was not produced, the question was withdrawn; and the defendant offered to prove by him, that he had received the hire of the negro, for a part of the time prior to November, 1840, and accounted for it to the plaintiff. His Honor rejected the evidence, as it did not relate to the hire, for which this suit was brought, and the defendant excepted.

The defendant also offered the deposition of one Barnett, which had been taken, as the witness was about to remove from the state. The deposition was taken on the 28th, and the notice was served on the 26th of December, 1847. The removal and absence of the witness were proven, and it was also proven that the plaintiff was present at the time and place of taking the deposition, protested against it for the insufficiency of notice, and asked no questions. His Honor rejected the deposition, and the defendant excepted.

*T. B. Venable*, *McRae*, *Miller* and *E. G. Reade*, for the plaintiff.

*Graham*, *Gilliam* and *Lanier*, for the defendant.

PEARSON, J. We concur with his Honor as to both of the matters excepted to.

The fact, that Capt. Beasley had received the hire for a part of the time, prior to November, 1840, and accounted for it to the plaintiff, had no bearing upon the issue. It

was irrelevant and properly rejected. It is the duty of the court to protect juries from such evidence, because it is apt to mislead, and in all cases renders the investigation of facts unnecessarily tedious and embarrassing.

It is very ingeniously argued for the defendant, that, although this evidence had no direct bearing upon the issue, it had a tendency to explain the general admission of the defendant, which was relied on by the plaintiff, that it was too broad as to the time prior to November, 1840; and thus furnishing ground for an inference, that it was also too broad as to the time subsequent to that date. If the fact, that an admission is too broad as to the time not sued for, furnishes any ground for the inference, that it is also too broad as to the time, which is sued for, it is very remote and attenuated—too much so for any practical purpose.

The deposition was properly rejected. The law requires three days' notice, not merely to enable the party to get to the place, but to prepare himself, by examining his papers, deciding upon the proper mode of cross-examination, and consulting his counsel, if need be; hence, the proper notice must be given, unless it is waived, either expressly or impliedly. If a party be present and makes no objection, but allows the deposition to be taken, and, particularly, if he shows his concurrence by a cross-examination, a waiver of notice is implied. But in this case, the plaintiff expressly objected, and did not cross-examine, and the idea of implying a waiver of notice, under such circumstances, is absurd.

As to the mode of counting the days, the proper rule is to count one day inclusive and the other exclusive. Here, there was one whole day and a part of two other days. If the day, on which the notice was given, be included, the day, on which the deposition is taken, should be excluded. This makes the notice short enough; and a

good deal might be urged in favor of requiring three whole days; but we adopt the rule, allowing one day inclusive and the other exclusive, for the sake of having one fixed and uniform rule. It is believed, that this is the rule, adopted as to the time of executing and returning writs, and in other matters of practice.

PER CURIAM. Judgment affirmed.

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SANDERS JOHNSON v. MOSES CHAMBERS.

In an action for malicious prosecution, the oath of the prosecutor in the original complaint or before a magistrate is evidence for him.

A defendant, in an action for malicious prosecution, is only to be fixed with the want of probable cause, by what he knows when he commences the prosecution; although he is allowed to protect himself by any facts, which he is afterwards able to prove, which shew the plaintiff to be guilty, or tend to shew it.

The dismissal of a state's warrant by a magistrate raises the presumption of a want of probable cause, but not of malice.

The law raising no such presumption, the question of malice must be left to the jury, as a question of fact, and cannot be decided by the court.

The case of *Bell* v. *Pearcey*, 5 Ire., 84, cited and approved.

Appeal from the Superior Court of Law of PERSON County, at the Spring Term, 1849, his Honor, Judge *Dick*, presiding.

This was an action upon the case for malicious prosecution, with a count for slanderous words. The plaintiff produced in evidence a state's warrant, sued out against him at the instance of the defendant, charging him with having stolen money from him. Upon this warrant he

was arrested, and afterwards discharged by the examining magistrate at the costs of the prosecutor.

The plaintiff then examined Madison McMurray, the constable, who served the said warrant. This witness stated, that the defendant brought the warrant to him on the same day it was issued, and told him, that he believed Sanders Johnson had stolen his money: that they had been drinking together the previous day and night in Roxboro', at the tavern of George Chambers, (a retailer of spirituous liquor:) that said Johnson said he had no money of his own, after night, and that he had stood his surety for three drinks at four pence a piece; that Johnson had seen him count his money in the presence of George Chambers, and, instead of going to sleep at Alexander Hopkins', where he had stopped when he came to town, and where his horse was, he insisted upon sleeping with him; that they slept together in the same bed, and, upon waking very early in the morning, he found, that Johnson had left, and that his money was gone; that he then went to Hopkins', who told him, that Johnson had come there that morning, when it was not light enough clearly to distinguish objects, and called for his horse, and when he (Hopkins) insisted upon his staying to breakfast, he declined, saying, that he had to go to his mother-in-law's, where there was to be a renting that day. The witness further testified, that he proceeded in pursuit of Johnson to the place designated, where he arrived about eleven o'clock, but he had not been there; that he remained some time, and then went in search of him in other places, and again returned and watched for him at night, but he did not come there; that he arrested him the next day and found upon his person fifty or seventy-five cents. The witness said, that he had seen Johnson that day, before the warrant was issued, at Roxboro', who told him, that he did not have one cent of money, and borrowed

from him either twenty-five or fifty cents. This was some time before night.

George Chambers, a witness for the defendant, said that the plaintiff and defendant were drinking in his grog shop at Roxboro', on the day above mentioned, and again, at night; and that, after night, the plaintiff, Johnson, said he had no money, and Chambers stood his surety for three drinks of spirits: that, some time after night, Chambers, who had received some money during the day, counted it by the candle in his shop, and that Johnson and several other persons were present, but whether Johnson was in the immediate presence of Chambers, he could not say; but he saw Johnson there within a few minutes of the time, both before and after the money was counted. This witness further stated that both Johnson and Chambers were intoxicated, but Johnson not so much so as Chambers; and that Chambers, to whom the house belonged, had reserved two rooms in it, in one of which some negroes belonging to him lodged, and in the other Chambers slept himself; and that, before he left the house, he found that Johnson had gone into the room among the negroes, and was with them, and that he made him come out; that Johnson slept with Chambers; and that there was but one bed in the room.

Alexander Hopkins, called for the defendant, said that the plaintiff had put up his horse at his house in Roxboro', and called for him at or before daylight, and refused to wait for breakfast, saying that he had to go to a land-renting at his mother-in-law's, which, witness said, was thirteen miles from Roxboro'; that Johnson told him he had slept with Moses Chambers the night before.

The plaintiff then examined William Jones, a brother-in-law, who said that he was going up to a sale on the day the plaintiff was arrested and met him in the road; that he told the plaintiff that the constable was in pursuit of

him and would be at the sale; the plaintiff said he would go there and surrender himself, if the witness would first go with him home, which he did; that he accordingly went to the sale and was there arrested; that Johnson was coming from the direction of his sister's when the witness met him, and his sister was sick; and that he had heard that the legatees were to have met the day before at Johnson's mother-in-law's to settle, but that there was no such meeting.

Three witnesses were examined for the plaintiff, who proved his general character to be good.

The court charged the jury, that, as the magistrate had dismissed the warrant, on which the plaintiff had been arrested, it was incumbent on the defendant to show that he had probable cause for suing out the said warrant. And the court further charged the jury, that, taking all the facts to be true, as proved, they did not create such a probability of the plaintiff's guilt as ought to induce an ordinarily prudent man, properly guarding the rights of others, to sue out a warrant; and, therefore, the only question for them was, what amount of damages the plaintiff was entitled to recover, and that was a question solely for them, having a proper regard to all the circumstances of the case.

The jury found a verdict for the plaintiff; and the defendant obtained a rule, &c., which was discharged. Judgment was rendered, and the defendant appealed.

*E. G. Reade* and *Kerr*, for the plaintiff.

*Norwood*, for the defendant.

PEARSON, J. His Honor charged, "that, taking all the facts to be true, as proved," there was no probable cause. We think there was not only probable cause, but strong proof of guilt. The defendant's money was stolen—n one had a chance to steal it but the plaintiff. The plaint

iff knew, that the defendant had money—insisted on sleeping with him, instead of going to his own room—left town the next morning before day, under suspicious circumstances; and, when told of the charge, instead of hastening to the plaintiff to make explanations, takes care to go to his sister's before he is arrested.

We suppose his Honor did not give the defendant the benefit of his oath before the justice of the peace, as evidence for him; and, of course, did not think there was any evidence, that the money had been stolen. This may account for the conclusion that there was no probable cause. But it is well settled, that in actions of this kind, the oath of the defendant is evidence for him. *Moody* v. *Pender*, 2 Hay., 29; *Swaim Stafford*, 3 Ired., 293. The good sense of the rule cannot be doubted; for, in many cases, the facts, which make out probable cause, are known to the prosecutor only, and to exclude his oath in relation to them would be to hand him over to the mercy of the person charged, whenever there happened not to be a conviction; and all, who escaped the whipping-post, would turn around and bring an action for malicious prosecution.

In deciding the question of probable cause, the fact sworn to by the brother-in-law of the plaintiff, that he went to the sale to surrender himself, and the fact of his having only 75 cents when arrested, and his good general character, which, it was proven, was known to the defendant at the time he took out the state's warrant, ought not to have been taken into consideration by his Honor. The defendant is only to be fixed with a want of probable cause, by what he knows, when he commences the prosecution; although he is allowed to protect himself by any facts, which he is able afterwards to prove, which show the plaintiff to be guilty, or which tend to show it. This is fully discussed in *Bell* v. *Pearcy*, 5 Ire., 84.

His Honor also erred in telling the jury, "that the only question for them was the amount of damage."

The gist of the action is the want of probable cause, *and malice.*

The dismissal of the State's warrant raised a presumption of the want of probable cause, but it did not also raise a presumption of malice; for, the question of malice was not inquired of by the justice of the peace. His investigation was confined to the inquiry, as to the existence of probable cause. How could his decision affect the question of malice?

Malice may, in some cases, be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make; and it should have been left to them, in addition to the question of damage.

PER CURIAM. Judgment set aside and a *venire de novo* awarded.

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JAMES WATTERS to the use of ABSALOM ROE v. WILLIAM E. SMAW.

A bond was given to A. B. for the rent of a house and lot, and in the same instrument was the following stipulation, "and the said A. B. is to put the house in order and put up the fences," &c. The lessee entered upon and enjoyed the premises during the time; *Held*, that the covenant to repair was not a precedent condition, and that A. B., was entitled to recover the rent, withoutshewing that he had made any repairs.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

The action is in debt, upon a sealed instrument, which is as follows: "On or before the first day of January, 1843, we promise to pay James Watters, or order, the sum of sixty dollars for the rent of a house and lot, and the said Watters is to put the house in order and put up the fences," &c. The defendant, Smaw, went into possession of the premises and enjoyed the use of them during the term of his lease. No evidence was offered by the defendants on the trial, but it was insisted by them that the covenant to repair was a precedent condition, and that the plaintiff could not recover on the bond without showing a performance on his part. The presiding judge ruled to the contrary; and on his instructions, the jury gave the plaintiff a verdict, and the defendant appealed.

No counsel for the plaintiff.

*Rodman* and *Biggs*, for the defendant.

NASH, J. In the construction of covenants, courts of justice are tied down to no precise and technical rules. The object is to ascertain the sense and meaning of the parties. To arrive at a just conclusion, the nature of the transaction and the instrument itself must form the guides. Nor is it material in what order the covenants, to be performed by the several parties, appear in the instrument—the court will, if necessary, transpose, to arrive at the true sense. The whole instrument must be consulted. Governed by these principles, it is not difficult to see what the parties did mean in this case. The object of the plaintiff was to rent out his house and lot, and that of the defendant, Smaw, to secure its use and occupation. Both these objects were attained by the contract. The lessee was put in possession of the premises and enjoyed them during the time specified; and the lessor was secured of his rent by the bond, by which the defendants agreed to pay the sum

sued for on a fixed and certain day. In the same instrument it is stipulated, that the lessor shall repair. No words of condition are annexed, nor is the amount of repairs, or the time within which they are to be made, specified. These covenants are manifestly independent of each other, and mutual, and are not conditions precedent. The parties did not so mean nor did they so intend. What was the amount of repairs required, or whether any was necessary, nowhere appears in the case, except in the covenant to repair or put in order. If the defense made here was sustained, any part of the repairs, however small, not made during the lease, would defeat the action. The consequence would be, that the defendant would have enjoyed the house and lot for the year he rented it and pay the plaintiff nothing. This would be unjust; and ought not to be allowed, unless the agreement of the parties to that effect appeared clearly. The plaintiff has substantially performed that which he contracted to perform—put the defendant, Smaw, into possession of the house and lot; and the lessee has gotten substantially that which he contracted for; and any special injury, he may have sustained by the non-performance by the plaintiff of the covenant to repair, may be compensated to him in damages, and he cannot, in a suit to recover the rent, plead the covenant as a condition precedent. *Boon* v. *Eyre*, 1 Henry Blackstone, 173; *Campbell* v. *Jones*, 6 Term Rep., 570; *Fothergill* v. *Walton*, 8 Taunt., 573. We concur with his Honor in the opinion expressed below.

PER CURIAM. Judgment affirmed.

ORVILLE ANDERSON v. JAMES W. DOAK.

Where a contract is made in another state, it is to be governed by the laws of that state, and not by those of North Carolina.

Where A. conveys property by a deed of trust for the payment of debts, and the debts are unsatisfied, the property is not subject to an attachment against A.

The cases of *Davis* v. *Coleman*, 7 Ire., 424; *Parkerson* v. *Massey*, 5 Ire., 192; *Pool* v. *Glover*, 3 Ire., 120; *Coffield* v. *Collins*, 4 Ire., 486 cited and approved.

Appeal from the Superior Court of Law of GUILFORD County, at the Fall Term, 1849, his Honor, Judge *Settle* presiding.

This was an action of trover brought by the plaintiff to recover the value of a negro man, by the name of Harper.

The parties agreed upon the following statement of facts, and submitted them to the court: Prior to the month of December, 1841, one Stafford Weatherly, lived in the county of Guilford in this state, and owned the slave in controversy, with other property. In the month of December, 1841, the said Weatherly moved from this state to the county of Carroll, in the state of Virginia, and took the slave Harper with him, having previously contracted debts in this state, which were unpaid at the time of his removal. The said Weatherly settled in Hillsville, in Carroll county, where he contracted several debts; and, in order to secure the debts he had contracted, he executed a deed of trust, bearing date the 19th day of July, 1845, to the plaintiff in this action, in which he conveyed, among other property, the slave in controversy. The deed of trust had no subscribing witness to it, but was duly acknowledged on the day of its execution before

the clerk of Carroll county court in Virginia, in his office and duly recorded. Several of the bonds secured in the trust had not arrived at maturity at the time of executing the trust, under which it was provided, that the trustee should act when the bonds fell due, if not paid off. The slave Harper remained with, and in the possession of Weatherly, until about the 1st of May, 1846, when he committed some alleged offence and ran away from Carroll county in Virginia, and returned to the county of Guilford, in this state, where the defendant, who was then sheriff of the county of Guilford, seized the said slave and took him into possession, by virtue of an attachment issued in favor of Samuel McLintock against the said Stafford Weatherly, on the 1st day of May, 1846, which attachment was founded on a debt contracted by said Weatherly previous to the month of December, 1842, the time that the said Weatherly moved from the state. At the time the slave ran away from Virginia, some of the debts secured under the trust had not fallen due. It is proven and admitted, that, by the laws of Virginia, a subscribing witness to a bill of sale or deed conveying slaves is not necessary, and that the proof and registration of the trust deed are done agreeably to the laws of Virginia. It is further admitted, that the debts secured under the trust are *bona fide* debts, and that the trust was honestly made. It is also admitted, that the debt due Samuel McLintock, on which the attachment issued, was an honest, *bona fide* debt. If, upon this statement of facts, the court shall be of opinion with the plaintiff, judgment is to be entered against the defendant for the sum of $530 with costs of suit, but if the court shall be of opinion with the defendant, a nonsuit is to be entered.

Upon this case agreed, it was considered by the court that the plaintiff have judgment against the defendant for the sum of $530 and his costs of suit. From this judgment the defendant appealed.

*Morehead* and *Kerr*, for the plaintiff.

No counsel for the defendant.

NASH, J. We see no reason to disturb the judgment below. At this time the defendant took possession of the slave, Harper, under the attachment; Stafford Weatherly had no interest in him, which was liable to the process. When he removed from this state to Virginia, he took Harper with him, and, having contracted debts there, he conveyed him to a trustee to secure them. It is admitted in the case agreed, that the debts so secured were honestly due, and that several of them had not arrived at maturity; and it is further agreed, that the conveyance to the trustee tee was in good faith, and, by the laws of Virginia, a subscribing witness to a bill of sale or deed conveying slaves is not necessary; and that the proof and registration of the deed of trust are according to the laws of that state. If so, the legal title was in the trustee—the contract being made in Virginia is to be governed by the laws of that state, and not by those of North Carolina. *Davis* v. *Coleman*, 7 Ire., 424, where it was decided, that, where a contract for a loan of money was made in Georgia, a note executed in this state to carry it into execution, reserving interest according to the laws of Georgia, was not usurious, if made in good faith. The legal estate being in the trustee, and many of the debts, for which it was made, being still outstanding, Weatherly had no such interest as was liable to attachment. *Parkerson* v. *Massey*, 5 Ire., 192; *Pool* v. *Glover*, 2 Ire., 120; *Coffield* v. *Collins*, 4 Ire., 486.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

WILLIAM MILLS v. JAMES L. CARPENTER.

After pleading in chief, it is too late for the defendant to take exception to the writ.

In an action of assault and battery, when the defendant offered evidence to shew that he was not actuated by malice in making the assault, it is competent for the plaintiff, in reply, to prove that the defendant, since the commencement of this action, had proposed to fight him, though this proof could not have been offered in chief.

The cases of the *State* v. *George*, 8 Ire., 328; *Causer* v. *Ander*, 4 Dev. & Bat., 246; *Sledge* v. *Pope*, 2 Hay., 402, and *Green* v. *Cawthorn*, 4 Dev., 409, cited and approved.

Appeal from the Superior Court of Law of STANLY County, at the Fall Term, 1849, his Honor, Judge *Dick*, presiding.

This was an action of trespass for an assault and battery, committed by the defendant on the plaintiff, to which the defendant pleaded the general issue. The plaintiff proved, that the defendant and his son and a number of other persons were assembled at a sale. The son of the defendant became intoxicated, and made an attack on several persons, and behaved so badly, that a justice of the peace, present, ordered a constable to take the defendant's son into custody. The constable summoned the plaintiff, with other persons, to aid him in taking the son of the defendant into custody. The son of the defendant was taken into custody by the officer, the plaintiff and others; and while the plaintiff was holding the son of the defendant, in obedience to the order of the constable, the defendant struck the plaintiff with a large stone in the face, inflicting a wound and injuring the plaintiff's eye.

The defendant's counsel, on the cross examination of the plaintiff's witnesses, endeavored to show, that the conduct of the defendant arose from momentary excitement, and not from malice or ill-will of the defendant towards the plaintiff. The plaintiff then proposed to prove, that, after the commencement of this suit, the defendant met the plaintiff at the court-house, and offered to fight the plaintiff, which the plaintiff declined. The defendant's counsel objected to the evidence, but the court admitted it. The defendant's counsel then moved to nonsuit the plaintiff, because there was an error in one of the dates of the original writ. The court overruled the objection. The jury returned a verdict for the plaintiff. The defendant moved for a new trial, which was refused. He then prayed for, and obtained, an appeal to the Supreme Court.

No counsel for the plaintiff.

*Strange*, for the defendant, submitted the following:

The court guards the jury from irrelevant testimony in the same manner as other incompetent proof. 2 Phil. Ev.; Hill and Cowan's notes, page 428, note 326 to page 169, cites *Hust* v. *Newland*, 3 Hawks., 122–3; words and acts at the time are proper in actions of assault and battery, but not words spoken at a different time. *Green* v. *Cawthorne*, 4 Dev., 409.

NASH, J. This is an action of trespass for an assault and battery, to which the defendant pleaded the general issue. After the jury were charged with the cause and the evidence closed, the defendant moved the court to nonsuit the plaintiff, "because there was an error in one of the dates of the original writ." The court refused the motion, and very correctly. After pleading in chief the defendant came too late to make the objection.

The plaintiff, on the trial, having produced evidence to

prove the assault and battery, the defendant's counsel, on his cross-examination of the witnesses, endeavored to show, that the conduct of the defendant arose from momentary excitement, and not from malice or ill-will towards the plaintiff. The plaintiff then proposed to prove, that after the commencement of this suit, the defendant met him at the court-house and offered to fight him. This evidence was objected to by the defendant's counsel, but was admitted by the court. We agree with his Honor in its competence.

It is a prominent rule of evidence, that testimony shall be confined to the issue, and be material and relevant to it; and the court will carefully, as far as they can, guard the jury from hearing evidence that is not relevant, as tending to withdraw their attention from the proper inquiry before them. The rule is often of difficult application—the relevancy or irrelevancy of the testimony sometimes depending on something to be proved at a future stage of the trial. In such case, if such evidence has been inadvertently admitted, the correction is with the judge, who ought to direct the jury to throw it aside in making up their verdict; and, if he has reason to believe that they have been influenced by it, to grant a new trial. But testimony, which is irrelevant in chief, may be rendered relevant by the course pursued by the opposite party. Thus a party cannot sustain his witness by showing, that he has at other times made the same statement, until his testimony has been attacked. *State* v. *George*, 8 Ire., 328. So, on an indictment for larceny, the state cannot give evidence, that the character of the defendant is bad, until he has opened the door to the investigation by offering evidence of his good character. In both these cases, the evidence may be rendered competent, as well by a cross-examination as by introducing other witnesses. In the present case, the plaintiff seeks to recover damages for an assault and battery committed on him by the

defendant. As a general rule, he has a right to expect and receive from the jury a fair compensation for the injury really sustained. But he is not restricted to this measure, but, in addition to it, the jury may give him what are called exemplary damages by way of punishment of the defendant, when it appears, that the latter was actuated by malice. *Causer* v. *Ander*, 4 Dev. & Bat., 246. The existence of malice on the part of the defendant, at the time the trespass was committed, was a legitimate subject of inquiry by the jury, and necessarily entered into a proper discharge of their duties. It may be shown in different ways: thus, on indictments for murder, when malice is an essential ingredient in constituting the crime, previous threats is a common and familiar mode of showing it. So, in assault and battery, *Sledge* v. *Pope*, 2 Hay., 402. The evidence objected to here was of an offer to fight the plaintiff after the battery, for which the action was brought, and after its institution. This, as evidence in chief, was not admissible, but was rendered so by the course pursued by the defendant. It was a fact the party had a right to lay before the jury, in reply to the defendant's evidence, that he had no malice against the plaintiff. This constitutes the difference between this case and that of *Green* v. *Cawthorn*, 4 Dev., 409. There the rejected testimony was offered in chief.

We see no error committed by the presiding judge.

PER CURIAM. Judgment affirmed.

ELISHA WADE v. JOAB HIATT.

Under the act of 1840, ch. 28, the possession by a fraudulent donee cannot operate as notice of the conveyance to him of any land, but such tract or parcels of tracts, as may be occupied by him at the time of the second purchase; and especially it cannot so operate, as to any parcels, continuing in the possession of the donor.

Appeal from the Superior Court of Law of ROCKINGHAM County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

This is an action of trover for a quantity of Indian corn, which was tried on the general issue. One Adam Sharp owned a tract of land in fee, on which he had resided for forty years, and in 1843 he made a voluntary conveyance of it to the defendant. Under it the defendant took possession of a mill, a dwelling-house, and some fields situate on one end of the tract, and he occupied them as his own up to May the 25th, 1845, and afterwards. Notwithstanding the deed made by Sharp, he continued to reside on the other end of the tract in the houses in which he had before lived, and to cultivate certain fields thereon; and in 1845, he planted a crop of corn in one of the fields thus occupied by him, and cultivated it up to the 25th of May, when he leased the premises, then in his occupation, to the plaintiff for the residue of the year; and the plaintiff entered and finished the cultivation of the crop. When the corn became ripe in autumn, the defendant went to the field and gathered it and converted it to his own use.

On the part of the plaintiff, it was insisted that the deed from Sharp to the defendant was fraudulent and

void as against the plaintiff; he being a subsequent lessee and purchaser for full value and without notice of the deed. Thereupon the counsel for the defendant moved the court to instruct the jury, that, if they believed the defendant, at the time of the lease or sale to the plaintiff, was in possession of parts of the land conveyed to him by Sharp, such possession was in law notice to the plaintiff of the said conveyance, as well in respect of those parts of the land so occupied by Sharp and by him leased to the plaintiff, as in respect of the parts of it so occupied by the defendant himself. The court refused the instruction, and there were a verdict and judgment for the plaintiff; and the defendant appealed.

*Morehead* and *Kerr*, for the plaintiff.

*Iredell*, for the defendant.

RUFFIN, C. J. The question arises upon the act of 1840, ch. 28. It enacts, that no person shall be taken to be a purchaser within the act of 1715, unless he purchase without notice of the conveyance by him alleged to be fraudulent; and that possession taken or held by or for the person claiming under such conveyance shall be deemed notice in law of the same. We think it clear, that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance; and that such possession of the donee or for him amounts to notice, in respect only of those tracts or parcels, to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. The protection given by the statute to a prior conveyance, though covinous, is not founded on its own merits; for, then, it ought to be held good against every one. But it is founded on the bad faith of a person, who subsequently buys land, which he knows at the time his

vendor had before conveyed to another. We need not consider now, what evidence will in general establish such a knowledge of the previous conveyance, as will make it an act of bad faith to make the purchase. It would seem, indeed, that a suspicion of notice would not suffice for that purpose, though it might be a strong suspicion. For, as far as notice of the previous conveyance *per se* affects the subsequent purchaser, it is assumed that he was a purchaser for full value, and that the first transaction was fraudulent; and in such a case it would appear but reasonable, to require plain proof of the second purchaser's knowledge of the former deed, as in other cases of a guilty *scienter*. But this statute makes the possession of the fraudulent donee notice to a subsequent purchaser. It is not merely evidence; but in itself is notice. As such it is relied on by itself, on the part of the defendant. The questions, then, are: of what fact is possession notice? and of what must there be a possession by the donee to constitute the notice? The statute upon its face answers, that the thing to which the notice refers is the previous conveyance for the land the person is about to buy. Very clearly, too, the possession, to which the act imparts the character of notice to the person in treaty for the land, must be the possession of the land, which is the subject of the treaty. A possession of that kind only can tend to inform one in treaty for a particular parcel of land, that another person claims, or has a conveyance for it. If a fraudulent deed be made for two tracts of land, possession taken of one of them by the donee conveys to the world no intimation, that the conveyance covers the other. The statute means, as far as possession is made *per se* notice, that, at the time of the second purchase, there shall be an actual possession and occupation by the donee or by his tenant, other than the donor. It is true, the donor, who remains in possession, is in under

the donee, and in some sense may be said to hold for the donee. But, as constituting notice to the world of the deed from the one to the other, the possession of the donor after the deed is not the possession of the donee in the sense of the statute. As far as possession of land is evidence of title, the continuing possession of the donor imports that he has not conveyed to another; and to allow a contrary inference would often be actually deceptive. Besides, the terms of the act "taken" and "held," imply a change in the apparent possession—that of the donor ceasing, and a new visible one by the donee succeeding it. Therefore the possession by a fraudulent donee cannot operate as notice of the conveyance to him of any land, but such tracts or parcels of tracts as may be occupied by or for him at the time of the second purchase; and especially it cannot so operate, as to any parcels continuing in the possession of the donor. From the possession by the defendant of the mill and field and his dwelling-houses, the plaintiff might infer, that Sharp had conveyed those parts to the defendants. But on the other hand, Sharp had been in possession of the other parts of the tract for forty years and still continued to occupy and cultivate those parts up to the time the plaintiff took his lease for them: and it is impossible the plaintiff could infer from such occupation by Sharp, that he had conveyed those parcels to the defendant, and then had no right to lease to the plaintiff: and the statute could not mean that he should so infer. In such a case the possession of the donee must be his actual possession of the land or a part of the land, which is covered both by the conveyance to him, and that to the second purchaser, and, as to such parcels as are still occupied by the donor, there is nothing to give notice. Upon any other construction the statute would work frauds, instead of suppressing them,

PER CURIAM. Judgment affirmed.

WILLIAM A. HAMLIN v. DANIEL MCNIEL, et al.

Where an action is against two, the entering of a *nolle prosequi* against one does not discharge the bail of the other.

The case of *Bradhurst* v. *Erwin*, 10 Ire., 54, cited and approved.

Appeal from the Superior Court of Law of CHATHAM County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

The case is: a writ issued from the office of the clerk of Chatham superior court, at the instance of the plaintiff, against James A. McNeil and Daniel McNiel, in covenant upon a sealed instrument. It was duly executed and a bail bond taken, with John McNiel and Henry Arnold, the defendants, as bail. One bond only was executed. On the return of the writ, the plaintiff caused a *nolle prosequi* to be entered as to Daniel McNiel, and prosecuted his suit to judgment against James A. McNiel. The judgment not being paid, this *sci. fa.* issued to subject the defendants as bail. The question sent here arises on the second plea of the defendants, which is that "the bail are discharged by the amendment of the original writ, by which a *nolle prosequi* was entered as to Daniel McNiel, one of the original defendants."

Judgment was rendered for the defendants and the plaintiff appealed.

*W. H. Haywood*, for the plaintiff.
*Kelly* and *D. Reid*, for the defendants.

NASH, J. The whole ground assumed in the plea is covered by the case of *Bradhurst* v. *Erwin*, 10 Ire. Rep.,

54. There, as in this case, the original action was against two defendants upon a contract. The plaintiff suffered a nonsuit as to one, and obtained judgment against the other. Upon *sci. fa.* to subject the bail, the same defense was attempted, as here, but unsuccessfully. It is very certain, that any alteration of a writ, which changes the nature of the action, as from trespass to case or otherwise, will discharge the bail. Here, the nature of the action was not altered—after the *nol. pros.* against Daniel McNeil, it still continued an action of covenant. The bail of James A. McNeil were not discharged, and are liable as such.

The jury found the facts upon this plea specially, and it was agreed by the parties, that the court should pronounce such judgment upon them, as was agreeable to law. The presiding judge, being of opinion, that the bail was discharged by the *nol. pros.*, pronounced judgment for them. In this judgment there is error; and it is, therefore, reversed, and judgment given for the plaintiff.

PER CURIAM. Judgment for the plaintiff.

JOHN BLACK v. SOLOMON EASON.

A. conveyed to B. a tract of land, "together with the horses, cattle, &c., and all crops on the ground," in trust to sell for the payment of debts. At the date of the deed there was a corn crop on the ground, but it was afterwards destroyed by a frost, and a new crop was planted by A., who had been permitted to remain in possession. C. afterwards seized this new crop and converted it to his own use; *Held*, that B. was entitled to recover the value of this crop from C. in an action of trover.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

One Lamb, by deed, dated 22nd of March, 1846, conveyed to the plaintiff a tract of land, "together with the horses, cattle, &c.," and "*all crops on the ground*," in trust, to sell and pay the debts enumerated, unless otherwise paid, before the 2nd of January, 1847.

At the date of the deed there was a corn crop in the ground, but on the 10th of April a severe frost destroyed the crop then growing—Lamb was permitted by the plaintiff to remain on the land, plough the ground, plant the crop a second time, and cultivate. The crop amounted to forty barrels, which were converted by the defendant, and this action is brought for the value.

His Honor was of the opinion, that the plaintiff was not entitled to recover, and a nonsuit having been entered, the plaintiff appealed.

*A. Moore*, for the plaintiff.

No counsel for the defendant.

PEARSON, J. We have arrived at a different conclusion. The intention, obviously, was to pass to the plaintiff the crop of corn, which might be made on the ground in 1846; and it could be urged with some force, that the words of the deed are broad enough to include the crop, which was made, although it was not literally the crop on the ground when the deed was executed.

But admitting that, by an unforeseen event, *the thing* conveyed was destroyed, and that the second crop is not embraced by the words of the deed, it is clear, that the title to this second crop was in the plaintiff. The land was his, and so were the farming utensils and horses. Lamb was permitted to remain on the land and cultivate the new crop, not for himself, as a lessee, but for the plaintiff, as his agent or servant; the consideration being, that this substituted crop was to be applied to the payment of debts, in the same way that the first crop and other property were to be.

So, although it may be, that the crop did not pass by the words of the deed, it became the property of the plaintiff, because it was made for him and upon his land. This result follows necessarily from the relation of the parties. An understanding, that Lamb was to make the new crop for the plaintiff, in the place of the crop destroyed, is as plainly to be implied, as if it had been expressed in so many words.

There must be a *venire de novo.*

PER CURIAM. Judgment accordingly.

WASHINGTON POOL and wife, et al. v. SAMUEL DAVIS, Adm'r, &c.

Where personal property is left to one for life, remainder to others, and, after the death of the tenant for life, it comes to the possession of the administrator of such tenant, those entitled in remainder cannot sue the administrator by petition in a court of law, under the statute, Rev. Stat., ch. 64, sec. 5, but must proceed in equity; because no such fiduciary relation as that contemplated by the statute exists between the parties.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

This was a petition filed in the superior court of law of Pasquotank county, at the fall term, 1849. The petitioners alleged, that one Sylvanus Clark died about the year 1837, leaving a last will and testament, a copy of which is appended to the petition; that Lurana Clark, named in the said will, is dead, leaving no issue; that the executor sold the land, directed in the said will to be sold, hired out the negroes, and sold the chattels; and that, after the payment of the debts, the executor paid over to the guardian of the said Lurana the surplus, arising from the sale of the said land and chattels, and the hire of the negroes, and that the same, after the death of the said Lurana, has been paid over by the guardian to the defendant, Samuel S. Davis, who has been duly appointed administrator of the said Lurana; that the petitioners are the heirs-at-law of William C. Donald, mentioned in the said will, and claim, as legatees in remainder, to be entitled to all the said surplus, arising from the

sales of the land and chattels and the hires of the negroes, and pray that the said Samuel S. Davis, administrator as aforesaid, may be decreed to pay them such surplus.

The defendant, Samuel S. Davis, admits the death of Sylvanus Clark; that he made a last will and testament as referred to in the petition, which was duly proved; that the said Lurana died, leaving no issue; that he administerd on her estate and that he has received from her guardian the amount stated in the petition, and that the petitioners are the heirs of William C. Donald, mentioned in the will. The defendant says that he is advised and so insists, that the petitioners are not entitled to anything under the said will but the proceeds of the chattels sold, and not to any part of the proceeds of the land sold, &c.

The following is a copy of the will of Sylvanus Clark, appended to the petition:

"I, Sylvanus Clark, &c., do make, publish and declare this my last will and testament. It is my will and desire that the tract of land, called "The Hendrick Taylor tract" to be sold, and six head of cattle. Also, it is my will and desire, that this money may be to pay my just debts, and the balance to the use of and benefit of my daughter, Lurana Clark.

"It is also my will and desire that my daughter Lurana Clark shall have this tract of land, whereon I now live, one-half of the crop of corn, that is now growing, to be sold for the use and benefit of my daughter Lurana Clark.

"I also want my negro man Smith to be hired out for the use and benefit of my daughter, Lurana Clark—one feather-bed and furniture to be sold, and all my chattel property, household and kitchen furniture, and the money to the use and benefit of my daughter Lurana Clark, to her and her heirs forever.

"Or, if she die without any heirs, for the money to be equally divided amongst William C. Donald's heirs.

"It is also my wish and desire, that my wife Mary Clark, shall have the use of the land, whereon I now live, as long as she keeps my child, Lurana Clark." Then follows the appointment of executors.

Upon the hearing on the bill and answer, the court decided, that the petitioners were only entitled to the proceeds of the chattels directed to be sold, and referred it to the clerk and master to inquire and report according to this decision of the court.

From this interlocutory order, by leave of the court, the petitioners appealed.

*A. Moore*, for the plaintiffs.

*Ehringhaus*, for the defendant.

PEARSON, J. The will in question was made after the year 1827, and it was properly admitted, that the limitation over is not too remote.

The matter controverted is, what part of the fund passes to the executory legatees under the words, "the money," in the clause, "or if she dies without any heirs, for *the money* to be equally divided amongst William C. Donald's heirs?"

His Honor was of opinion, that the executory legatees were entitled only to so much of the fund, as was made by the sale of the property included in the clause: "One feather-bed and furniture to be sold, and all my chattel property, household and kitchen furniture, and the money to the use and benefit of my daughter Lurana Clark, to her and her heirs forever."

This construction was, no doubt, suggested by the fact, that, as the will is written, this clause immediately precedes the clause containing the limitations over. There is, however, a full stop, and a space of nearly a whole line between them; and, although it is difficult to determine what the intention is, where a will is so badly writ-

ten and is so entirely without order and connection, as this one, we are satisfied, that the construction adopted by his Honor is too narrow, and that the limitation over includes, not merely the small part of the fund arising from the sale of the property contained in the above-recited clause, but embraces the whole fund—"the money" arising from the sale of all the property, which the testator directs to be sold.

After making ample provision for the favorite object of his bounty—his daughter—the testator attempts to make a disposition of what he had given to her, in the event that she should die without heirs. In doing so, he uses the words, "the money." What money? That which he had given to her and her heirs. These words are broad enough to include the whole fund, viz.: the proceeds of the sale of the Taylor tract and six head of cattle, after payment of debts, the proceeds of the sale of one-half of the crop of corn, and the proceeds of the sale of the bed and furniture, and household and kitchen furniture. We can see no reason for restricting their meaning, but a very sound one for allowing them to embrace the whole fund; because, it is unaccountable, why the testator should dispose of a small fraction of the fund, by making a limitation over in the event of his daughter's dying without heirs, and leave the larger part of it undisposed of, when the same reason existed for making a similar disposition of the whole.

The words, "the money," are not broad enough to include the tract of land, on which the testator lived, nor the negro man Smith; for, there is no direction to convert either this land or the slave into money. Hence, they do not pass by the limitation over, but belong to the heirs and personal representatives of Lurana Clark.

The decree in the court below is erroneous.

This is a summary proceeding, by petition, under the "Act concerning filial portions, legacies and distributive

shares of intestates' estates." Rev. Stat., ch. 64, sec. 5. The case made up does not fall within the provisions of that act, and the proceeding must therefore be dismissed. The act was intended to provide a short and plain remedy (as was supposed) for certain cases. The words used are very general, but the rules of construction require, that they should be restricted to cases, in which there exists the relation between the parties, contemplated by the legislature, as that of guardian and ward, executors and administrators and creditors of the estate, or legatees and distributees.

It has never been held, that the act extends to the case of a debt merely, where the only relation is that of creditor and debtor, or to a case, where an action *ex delicto* would lie, as if property be given to one for life with a limitation over, the executor assents, the first taker dies, and his personal representative detains or converts the property, the person entitled under the limitation must bring detinue or trover, and cannot proceed by petition. The contemplated relation does not exist.

In the present case, there is a trust fund arising from the sale of land and other property, which was given to Lurana Clark and her heirs, with a limitation over to the petitioners, if she died without heirs. The event has happened, and the administrator of the first taker has the fund in his possession, and the petitioners seek to invest him with the character of a trustee for them, when no such fiduciary relation has ever been constituted.

The legal title to the fund was vested in the executor, in trust for Lurana Clark, and upon a contingency in trust for the petitioners. Their remedy is in equity. The executor will be a necessary party to enable them to follow the fund in the hands of the administrator of the first taker, who has it in possession.

PER CURIAM. Ordered to be certified accordingly.

EDWARD C. CAVANESS, *qui tam*, v. JOHN B. TROY.

Where, upon an usurious contract, the lender receives from his debtor, in payment of the principal and the usurious interest, the note of a third person, he makes himself liable to the penalty for usury, in the same manner as if he had received payment in money.

The cases of *Brisendine* v. *Martin*, 1 Ire., 287; *Wilson* v. *Coffield*, 1 Ired., 513, and *Stedman* v. *Bland*, 4 Ire., 296, cited and approved.

Appeal from the Superior Court of Law of RANDOLPH County, at the Fall Term, 1849, his Honor, Judge *Settle* presiding.

This was an action of debt for the recovery of the sum of two hundred dollars, incurred by the defendant under the statute against usury.

The plaintiff's declaration charged, that the defendant, on the 9th day of February, 1842, entered into a corrupt agreement with one John Hutson to advance to him, by way of loan, the sum of $100, and the latter was to give him the sum of $5 for the forbearance of payment on the same for one day; that, in pursuance of the agreement, a bond was executed by the said Hutson to the defendant for the sum of $105, bearing date the 9th of February, 1842; that, on the 14th day of August, 1843, a credit of $14.50 was entered on said bond, and a note given by the said Hutson to the defendant for that sum payable one day after date; that on ..... day of March, 1844, a payment was made by said Hutson of the balance of said bond, being the sum of $103.40 principal and interest then due; and that the $14.50 was paid to the defendant by one Reuben Hendricks, on the 20th of January, 1846.

The plaintiff called the said Hutson, as a witness on the trial, who proved the agreement, the loan, and the execution of the bond, as stated in the plaintiff's declaration; that in the month of August, 1843, the defendant was about to enforce the payment of the money by suit, and, in order to save costs to said witness, the interest was calculated up to the said 14th day of August, 1843, and the note for $14.50 given, which included the interest and $5 of the principal, and a credit for that sum entered on the original bond, which reduced the debt within the jurisdiction of a magistrate; that a judgment was then taken against him before a magistrate for the balance due upon said bond, being the sum of one hundred dollars, which he paid on the ..... day of March, 1844, with interest; that at the same time he paid the defendant $300 in part of the purchase-money for a tract of land, which he had previously purchased of him; that the defendant at the same time held another bond against him for the residue of the said purchase money for the sum of $100, which bond had some time to run before its maturity; that his equitable interest in said tract of land was subsequently sold under an execution at the instance of one Horney, and purchased by the Randolph Manufacturing company for the sum of $175; that he then entered into an arrangement with the said company and the aforesaid Reuben Hendricks, whereby the said Hendricks was to pay the said company the sum paid by it for the land, the two notes held by the defendant, the one for $100, and the other for $14.50, and a sum sufficient to make him up the sum of $400.

The said Hendricks, then being called as a witness, proved the agreement between himself, the aforesaid company, and the said Hutson, as stated in the testimony of the latter; that, in pursuance of this agreement, he went to the defendant and informed him of the arrangement that had been made between himself, the said com-

pany, and the said Hutson, and proposed to take up Hutson's bonds, and substitute his own in their place; that a calculation was made by him of the interest due upon both his bonds against Hutson on the 20th of January, 1846, which, together with the principal, amounted to the sum of $123.28, and he gave the defendant his own bond for the sum of $109.28, and paid him the balance in money, and took the said two bonds, to-wit: the $100 bond and the $14.50 bond, and the defendant made him a deed; that, in pursuance of his agreement with Hutson, he then carried the bonds, thus taken up, and surrendered them to him; that nothing was said, either by him or the defendant, at the time the money was paid, as to its application; that no payment on the bond given by him to the defendant for $109.28 was made until January, 1847, which was eight months after the issuing of the writ in this case, when the sum of $20 was paid; and that the balance still remained unpaid at the time of his examination.

The defendant's counsel insisted, that, upon this evidence, if believed, the offence was not complete, for the reason, that the defendant had not received the usurious interest; that, inasmuch as the defendant held two bonds upon the said Hutson—one arising out of a lawful contract, and the other out of a contract forbidden by law, and inasmuch as the payment was made upon the general account, and was not specifically appropriated to either of the debts by either of the parties at the time of payment, the law would apply the payment to the debt upon the good consideration, and not to the one forbidden by law; that the payment made by Hendricks was thus appropriated *pro tanto* to the bond of $100; and that the other was included in the bond for $109.28, given by Hendricks, and not paid until after the commencement of this suit; and they requested his Honor so to instruct the jury.

His Honor refused the instruction thus prayed; and charged the jury, that, if they believed the evidence of Hutson and Hendricks, the offence was complete, when Hendricks made the aforesaid payment—substituted his own bond for Hutson's, and surrendered said bonds to him.

The jury rendered a verdict against the defendant for the sum of $200.

Rule upon the plaintiff to show cause why a new trial should not be granted, for the refusal of his Honor to charge as prayed, and for misdirection to the jury. Rule discharged, and new trial refused. Whereupon the defendant prayed for and obtained an appeal to the Supreme Court.

*Iredell*, for the plaintiff.

No counsel for the defendant.

PEARSON, J. The case presents this question: upon a usurious lending, the creditor receives the note of a third person in payment of the money lent and the usurious interest; does the creditor thereby incur the penalty? We had supposed this question too well settled to admit of doubt.

If a surety pays "money's worth," as bank notes, a horse at an agreed price, the note of a third person or the like, which is received by the creditor in payment, the action for money paid will lie. *Brisendine* v. *Martin*, 1 Ire., 287.

If a constable receives goods or labor in satisfaction of the claim, a warrant may be brought against him and his sureties, under the act to recover *money collected*. It is not necessary that he should have received the actual money. *Wilson* v. *Coffield*, 1 Ire., 513.

In *Stedman qui tam* v. *Bland*, 4 Ire., 296, it is taken for granted, that the reception of land, at an agreed price,

would complete the offence of usury. His Honor, Judge NASH, says: "It is not necessary, that the usurious interest should have been received in money—if received in property it is sufficient."

The law must be so; otherwise no payment would subject the usurer to the penalty, unless made in gold or silver—bank notes would not suffice—they are the notes of a corporation—not money.

The same reasoning, by which it is insisted, that, where the note of a third person is received in payment, the offence is not consummated, until the creditor collects the note, will apply with equal force, where a horse is received in payment; and it will follow, that, in such case, the offence is not consummated, until the horse is sold and the creditor receives the money. And in the case of bank notes, the offence will not be consummated, until the creditor collects the *specie* from the bank.

The defendant, by his exception, attempted to put the case upon the fact, that Hendrick paid $14 in money and gave his note for the residue, $109.28, and insisted, that the usurious interest would be presumed to be included in the note—so, as he contended, was not paid, when the note issued.

His Honor very properly put the case upon the broad ground, that, if no money had been paid, but a note of a third person was given for the whole amount and received in payment, the defendant had thereby incurred the penalty.

PER CURIAM. Judgment affirmed.

WILLIS LAMB v. HENRY P. GOODWIN, et al.

Where one conveyed to a trustee, for the purpose of paying his debts, all his interest in the goods in a certain store, his books, notes, accounts, &c., and the trustee sold the whole at public sale for a price upon which he fixed; *Held*, that the person, who made the conveyance, being present at the sale and not objecting, was bound by it, at least at law, however irregular the sale may have been.

The case of *Bird* v. *Benton*, 2 Dev., 179; *Governor* v. *Freeman*, *West* v. *Tilghman*, 9 Ire., 165, cited and approved.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

On the 22nd of April, 1846, the plaintiff, for the purpose of securing and paying certain debts, executed to one Black a deed, conveying several tracts of land, stock, farming utensils, &c., also all his stock in trade at Newby's bridge, and Pine Grove, consisting of dry goods, groceries, &c., "likewise all the books, accounts, notes, bonds, judgments, and other evidences of debts, due the said Willis Lamb; in trust, to sell the lands and other property, herein conveyed, at public auction for ready money, and convey the same by proper and sufficient assurances to the purchasers, and apply the money to the payment of said debts"—the sale to be made at Newby's bridge, after due advertisement.

In January, 1847, at Newby's bridge, Black offered, at public sale, all his right, title, interest, and claim, and every evidence of debt in and upon the Pine Grove establishment, which he had by virtue of the deed of trust,

except one account of $30, which one of the defendants afterwards paid him. The plaintiff was *standing by* when the offer to *sell was made and said nothing.* Black observed, he must have at least $375. One Wilroy had that sum for the defendants, and it was knocked down to the defendants at that bid. The goods were at Pine Grove, two miles distant. On the 8th of February, Black executed to the defendants a deed, conveying all his right and interest in the stock of goods at Pine Grove, and releasing to the defendants all the debts and demands against them, assigned to him in and by virtue of the deed of trust, for the consideration of $375.

On the 1st of April, 1846, the defendants signed the following instrument, not under seal:

"Received, April 1st, 1846, of Willis Lamb, in goods and merchandise, to the amount of two thousand and seventy-two dollars, of which we are to sell and pay, as fast as sold and collected, with the addition of twelve cents on the dollar on all goods sold, and when all parties agree to close said business the said Willis Lamb is to take back all goods, not disposed of, at the former cost."

The plaintiff also proved, that he advanced other goods upon the same terms subsequent to the date of the written contract; and that, on the 1st of November, 1845, he advanced the greater part of the goods estimated in the written contract of April, 1846; that he made a demand upon the defendants; that they refused, and this action was commenced. This action is assumpsit—pleas, general issue, payment, accord, and satisfaction.

The court charged, that the plaintiff was entitled to recover, unless he assented to the sale made by Black to the defendants; but, if he did assent, he was not entitled to recover, and his standing by and not forbidding the sale, was evidence of his assent, but not conclusive, and that fact was submitted to the jury. To this part of the charge the plaintiff excepted.

No counsel for the plaintiff.

*Heath* and *W. N. H. Smith*, for the defendants.

PEARSON, J. The plaintiff has no right to complain of the instructions. It is true, the trustee took a short way of closing the "establishment" at Pine Grove. It is not usual to sell goods that are not present—more unusual to sell them in one lot—and still more so to include in the same offer any balance due for the goods sold under a contract of agency, as to which no account had been rendered, and the amount whereof was indefinite and unascertained. But stripped of the circumstance of its being done at public auction, which was a mere farce, for no one but the defendants could be expected to bid, the transaction is simply this: the trustee asks the bailees and agents, who have the goods in hand and are liable under the contract, what sum in gross they will give for the goods and claim; they offer $375, which is accepted. This takes place in the presence of the plaintiff, who makes no objection.

The cases of *Bird* v. *Benton*, *Governor* v. *Freeman*, *West* v. *Tilghman*, 9 Ire., 165, were cited. The principle involved in that class of cases has no application to this. There, the sale was made by a *third person* and the owner stood by—here, as to the goods, the sale was made by the legal owner, and as to the claim for goods sold, by the trustee and agent of the plaintiff, and the price was to be applied to the payment of his debts.

A distinction ought to have been taken on trial between the goods, and the claim for the goods sold. By the deed of trust, the goods vested in Black, as legal owner—such as were sold afterwards were sold for him, and such as remained on hand belonged to him. So, in respect to the goods, the plaintiff was not entitled to recover, independent of his assent, and his remedy, if any, was in equity, for a breach of trust and fraud between the trustee and the defendants.

The amount, due for goods sold before the deed of trust, (we presume there was something due, although the case does not so state, but leaves it as a matter of inference,) was a chose in action, and the legal title did not pass. The effect of the deed was to make Black the agent of the plaintiff, with power to receive or sue for the sum due, in the name of the plaintiff, to be applied, when collected, to the purposes of the trust. Black had authority to make a settlement, agree upon the balance, and give an acquittance. So that the defendants were under the necessity of relying upon the alleged assent of the plaintiff, only to show, that he, having the legal title, and with full notice by his presence and silence, gave his sanction to the unusual manner of closing the business; and that a sum in gross was received in satisfaction of the choses in action for and on his account, and by his authority. This, if true, sustained the plea of "accord and satisfaction."

It is not stated how much was due, but, if it, together with the value of the goods, exceeded $375, the receipt of that sum by the plaintiff, through his agent the trustee, was a satisfaction.

The case does not fall within the principle, that a less sum received in payment, cannot be a discharge of a greater sum, as held in *Cumber* v. *Wayne*, reported in Strange, and cited in 1st Smith's leading cases, 147; for the principle is confined to cases, where the sum due is certain, and does not apply to a case like the present—an unliquidated demand of pecuniary damages, depending upon the extent of the sales made by the defendants. *Longridge* v. *Derrick*, 5 B. & A. 111, *id.*, note 149.

The plaintiff did not show a right to recover at law. Whether the circumstances, under which the sale was made, and the fact that no account was rendered by the defendants, whose duty it was to keep an account, will entitle him to relief in equity, and the effect of the assent

in that court, are questions about which we are not now called on to give an opinion.

PER CURIAM. Judgment affirmed.

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JOHN and ISAAC NULL, to the use of JOB WORTH v. WILLIAM H. MOORE, et al.

The plaintiffs placed in the hands of one A. a judgment to collect against B. Afterwards A. paid the amount of the judgment to the plaintiffs, but at the same time said he had received no part of the judgment from B., and the plaintiffs told him he might take the judgment and use it as his own; *Held*, that if this was a payment by A. without the authority of B., it was an officious payment by A. and could not protect B. against a suit against him on the judgment.

*Held*, secondly, that although the statement of A., which was introduced as evidence, was in writing, yet it was proper to leave it to the jury, whether A. paid the judgment as agent for B., or whether the transaction was not a purchase by A. from the plaintiffs.

The cases of *Sherwood* v. *Collins*, 3 Dev., 381, and *Blackledge* v. *Clark*, 2 Ire., 394, cited and approved.

Appeal from the Superior Court of Law of SURRY County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

This is a suit on a justice's judgment for about thirty-five dollars; and the controversy turned on the question, whether it had been paid by one Wright, a deputy sheriff, or by him purchased?

The plaintiff, Isaac Null, made the following statement, in a communication addressed to J. W. Brower, one of the defendants, in August, 1849:

"SIR: The note of hand I purchased of you, against William H. Moore, was, I think, in the year 1842, and according to your request I immediately placed it in the hands of Thomas B. Wright, deputy sheriff, for collection, some time, I think, in the year 1843. And the said Wright afterwards paid over said debt and interest to me and took up his receipt, that he had given me for the collection of said debt, but never mentioned that he was paying said debt out of his own funds. I never traded or transferred to any person whatsoever, neither have I ever authorized any person to collect said debt, since the said Thomas B. Wright paid me the same. The amount of the debt was between thirty and forty dollars. It is the only note I ever bought of you on William H. Moore, and as I have long since received the same, I have no claim or claims against you in any shape whatever.

"ISAAC N. NULL.

"Teste, E. BANNER."

The said Wright's deposition was taken, and he deposes as follows:

Question by plaintiff's agent: Did you, or did you not, have a judgment against the defendants in favor of John and Isaac Null in your hands for collection, for the sum of thirty-five dollars or thereabouts? If so, state whether the defendants paid that judgment? or if they did not pay it off, what was done with said judgment?

Answer: I had such a debt in my hands for collection, I think nearly about that amount, against the defendants, and in favor of John and Isaac Null, and on a settlement with Null I paid him off that judgment. I told him, that I had received no money from the defendants on said debt. Null then told me, that I could then take the judgment and use it as my own, and I then afterwards let Job Worth have it, (the judgment,) for which he paid me the full value, and neither of the defendants ever paid me anything on said judgment. THOS. B. WRIGHT.

The said deposition was taken on the 4th of June, 1849. Upon this testimony it was insisted for the plaintiffs, that the said judgment had been purchased from the plaintiffs by Wright, and was not, therefore, extinguished.

For the defendants it was insisted, that, according to the statement made by the plaintiffs, and according to the testimony of Wright, taken alone, it had been paid off by Wright, and not by him purchased. And the court was moved by the defendant's counsel to charge accordingly. The court declined so to charge; but told the jury, that the statement made by the plaintiffs proved a payment, but it was a question for them to decide, whether the testimony of Wright proved a purchase or a payment.

The jury found for the plaintiffs; and a rule for a new trial being refused, the defendants appealed.

*Morehead*, for the plaintiffs.
*Boyden*, for the defendants.

NASH, J. The case presents but one question for the decision of this Court. Were the instructions, asked for by the counsel of the defendants, such as ought to have been given? If so, the presiding judge erred in refusing them and there ought to be a *venire de novo*. It appears from the case, that the plaintiffs were the owners of a promissory note executed by the defendants, and which they placed in the hands of Thomas B. Wright, deputy sheriff of the county, for collection. Judgment was taken upon it, and in a settlement between the plaintiffs and Wright, the amount due upon it was paid by the latter. Whether this latter transaction between the sheriff and the plaintiffs was a discharge of the judgment, or a sale to the former, is the matter in contest. The action is upon the former judgment. On the part of the plaintiffs, it was contended, that Wright was a purchaser of the

judgment, which, therefore, was not extinguished. By the defendants, it was contended, that the payment of the money by Wright was a discharge of it. A statement in writing was made by Isaac N. Null, one of the plaintiffs, in which, after acknowledging the payment by Wright, he says, "but (he) mentioned, that he was paying the said debt out of his own funds. I never traded or transferred to any person whatever, neither have I ever authorized any person to collect said debt since," &c. The deposition of Thomas B. Wright was taken on behalf of the plaintiffs. He states, that, "on a settlement with Null I paid him off that judgment. I told him I had not received any money from the defendants on said debt. Null then told me, I could take the judgment and use it as my own, and I then let Job Worth have it, for which he paid me its full value, and neither of the defendants ever paid me anything on said judgment." The defendants' counsel asked the court to charge the jury, that, "according to the statement made by the plaintiffs, and according to the testimony of Wright alone, the judgment had been paid off by Wright, and not purchased by him." The court declined so to charge, but told the jury, that "the statement made by the plaintiffs proved a payment, but it was a question for them to decide, whether the testimony of Wright proved a purchase or a payment." Of the first branch of the charge, the defendants cannot complain—they got the full benefit of what they asked on that point. His Honor could not give the instructions, as respected the deposition of Wright. According to that testimony, his payment of the money was an officious one. As such, it afforded no protection to the defendants against the judgment. A plea of payment by a stranger is demurrable. *Sherwood* v. *Collins*, 3 Dev. Rep., 381. Wright was a stranger to the judgment. Neither would such a payment have conferred upon him any legal interest in it or claim against the defendants for the money. But it is further contended by the defendants'

counsel, that the testimony of Wright being in paper, the construction of it was a matter of law, and that it was error to leave it to the jury. Wright, in his deposition, does not swear, in so many words, that he had purchased the judgment, but he stated circumstances, from which, if true, a reasonable presumption might be inferred, that a sale to him did take place. In such case it is not error in law, for the court to submit the matter to the jury to be passed on by them, although it might think the jury would be well justified in not inferring the fact of a sale. *Blackledge* v. *Clark*, 2 Ire., 394. The jury might, indeed, have refused to find a sale and purchase, but the circumstances detailed by Wright certainly tend to that conclusion. In the language of the court in the case last cited, "they raise some suspicion or presumption," that such was the fact. Wright was the agent of the Nulls to collect the money, and if, at the time he paid the money, he did not purchase the judgment, he knew, as before stated, he would be entirely in the power of the defendants, and it would be at their option to refund the money or not. The presumption is strong, that he did intend to make them a present of the money. The presiding judge, therefore, committed no error in submitting to the jury the construction of his testimony. Nor does it make any difference, that his testimony was in writing—the same rule would apply to it, as if he had been examined before the jury, and had used the same language.

PER CURIAM. Judgment affirmed.

STATE to the use of F. and S. WARING v. N. B. WILROY, et al.

The term of a constable does not expire upon the day of the term of the court, corresponding with that, on which he had, the year before, qualified and given bond, but it expires at the instant, when his successor qualifies and gives bond.

The same construction must be given to the special provision for filling vacancies.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

This is an action upon the bond of Wilroy and the other defendants, taken in pursuance of the statute, for the performance by the former of the duties of constable for one year. It is dated the 9th day of March, 1844, which appears to have been Saturday, the last day of the term of Pasquotank county court. The breach assigned is, that the constable collected various claims put into his hands, as constable, for collection, and refused to pay upon demand. The facts are, that previous to the court, at which the bond was given, the claims in question were confided to the officer for collection; judgments were obtained in due time, and on the 9th day of March, 1844, the day on which the bond in suit was given, the constable collected the several demands—one for $42.65, another of $40 and interest from the 1st of January, 1840, and another of $17, and in April following another demand of $24.94.

These several amounts were demanded of the constable soon after the collection of the last-mentioned debt, and he failed to pay.

It is also in evidence, that the defendant, Wilroy, had been appointed constable at June term, 1843, to fill a vacancy, and that the term of his office under that appointment, viz.: the residue of one year, expired in the early part of the week of March term, at which the bond declared on was given. The claims in question were put into the hands of the constable in the summer of 1843, and, it was admitted, might have been collected, with the exertion of proper diligence, before the term of office, then current, had expired.

The counsel for the defendants was then going on to examine the testimony as to the time of the day on Saturday when the bond was given and the moneys collected, with a view to show, that the collections were made before the bond was entered into.

But the court arrested the examination, and instructed the jury, that, however that might be, if the moneys were collected on the same day and were in his hands at the time of the demand in April, the refusal then to pay them over, would be a breach of the bond entered into in March of that year.

There was a verdict in pursuance of the instructions.

Rule for a new trial for misdirection was discharged. Judgment, and appeal.

*Ehringhaus*, for the plaintiff.
*Heath*, for the defendants.

PEARSON, J. Whether the money was in the hands of the officer at the time of the demand, or not, is wholly immaterial, and there was no evidence in reference to it. His Honor must, therefore, be considered as putting the case upon the ground, that the fraction of the day

was not to be estimated, and the plaintiff was entitled to recover, if the money was collected on the same day, although before the bond was executed. We do not yield our assent to this proposition. But, as there is another ground of more general application, upon which our decision may be put, we think it proper to do so.

By the act of 1833, Rev. Stat., ch. 24, constables are to be elected at any time within one month preceding the first county court, held in the several counties, after the first day of January in each and every year. The person elected is to be returned and recommended to the court at that term; and the court is to qualify him to act as constable for one year thereafter, bond with good security being first given.

It was obviously the intention, that the term of a constable should not end until that of his successor began, to avoid leaving a space between the two, when there would be no officer, and to prevent one term from running into the other, so as to have two officers at the same time.

This might have been effected by fixing upon a certain day of the term when the office of one should end, and that of the other begin. But it was anticipated, that from many causes, the person returned might not be able on that very day to give his bond; for this reason, no day is fixed and he is allowed the whole term to qualify and give bond; the court, of course, having a right to require him to give the bond or admit his inability to do so, in time to appoint another in his stead.

Such being the intention, it follows, upon a proper construction of the act, that the term of a constable does not expire upon the day of the term of the court, corresponding with that, on which he had the year before qualified and given bond, but it expires at the instant, when his successor qualifies and gives bond. So that, although the term is for one year, as a general expression, it may be

a few days longer or shorter than the precise number of three hundred and sixty-five days—exact precision was not called for. It is sufficient, "if the two *ends meet.*" The legislature thought it expedient to allow for a "little play," in the language of mechanics.

Assuming this to be the proper construction of the general provision, it will be readily seen, that the same construction must be given to the special provision for filling vacancies. Sec. 6.

The words: "who shall be qualified to act until the next election of constables, as above prescribed," taken literally, will always leave a vacancy from the day of the election until the next term of the county court, and thus the purpose of filling vacancies will be defeated to some extent in every instance. To avoid this absurdity the word "election" must not be taken in its strict sense —the act of choosing—but in a broad sense—the act of choosing and *inducting into office*—or in the words of the second section, being returned and qualified as an officer.

The first term of the defendant, Wilroy, did not expire on Tuesday of the county court in 1844, but continued until the time on Saturday, when he was qualified and gave bond as a constable for another term, which commenced at that time.

Whether the money collected on Saturday was received by Wilroy, while acting under the bond of 1843, or while acting under the bond of 1844, depends upon the fact of its being received before or after the last bond was executed. This fact is not ascertained by the verdict, and there must consequently be a *venire de novo.*

PER CURIAM. Judgment set aside and a *venire de novo.*

THE STATE to the use of G. ELLIOTT, Chairman, &c. v. J. Q. PERKINS, Adm'r, et al.

Although the Chairman of the Board of Common Schools may not have been appointed on the day prescribed by the statute, and although the bond he gives may not have been directed by the county court, yet if he accepts, and acts under the appointment, he and his sureties are bound by the bond, as upon a common law bond.

The case of the *State* v. *McAlpin*, 4 Ire., 148, cited and approved.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

This was an action of debt brought by the plaintiff on a paper writing, purporting to be a bond, given by Perkins, as Chairman of the Board of Superintendents of Common Schools for the County of Pasquotank, to which William H. Davis was surety. The Board of Superintendents were regularly appointed by the county court at September term, 1846; and on Friday, the 9th of October following, they met in the Clerk's office of said county, and appointed J. Q. Perkins their chairman, requiring him to enter into bond in the sum of $1,500, with William H. Davis as his surety; which is the paper writing now sued on, and which was filed with their Clerk. It is admitted, that Perkins and Davis signed the instrument, and handed it to the Clerk of the Board. It does not appear on the minutes of the county court, that the court required the Chairman to enter into bond, or named the penalty of the bond. It is in evidence further from the Clerk of the court, that the court did not, in his hearing, require the Chairman to give bond, nor did they instruct him to make any entry to that effect on the minute docket.

A reference was made in this case, and a balance of $613.71 was reported as due from the defendant, Perkins, as Chairman.

The defendants' counsel resisted a judgment against the surety to the bond on the following grounds: First, that the appointment of the Chairman by the Board was irregular, being made on Friday, the 9th of October, when the act of '44 and '45, ch. 36, sec. 3, requires it to be made on the first Tuesday in October, and, therefore, the surety is not responsible. Second, that, as the county court did not require the Chairman of the Board to give bond, and did not fix the penalty as required by act of '44 and '45, ch. 36, sec. 25, the bond was irregularly taken, and was not, therefore, binding on the surety.

These objections were overruled by his Honor, and judgment was taken for the amount found to be due by reference, $613.71. Rule upon the plaintiff to show cause why a new trial should not be granted. Rule discharged. Defendants appealed to the Supreme Court.

*A. Moore* and *Heath*, for the plaintiff.
*Ehringhaus*, for the defendants.

NASH, J. Every objection to the plaintiff's recovery, raised in this case, is answered by the Court in the *State* v. *McAlpin*, 4 Ire., 148. It is there ruled, that, although a bond, executed by a public officer to the State for the discharge of public duties, is not taken in the manner or by the persons appointed by the law to take it, yet it will be good as a voluntary bond and bind the sureties. That was an action upon a sheriff's bond, which was not taken according to the provisions of the statute. The objections here are, that the appointment of the Chairman by the Board of Superintendents was irregular,

because it was made on Friday, the 9th of October; whereas, by the act of 1844, it is required to be made on the first Tuesday in October; and, for the reason, that the County Court of Pasquotank had not required the Chairman of the Board to give any bond in any sum whatever. Admit, that, for these reasons, taken separately or conjointly, the bond given by the Chairman was not in accordance with the requirements of the act, and, therefore, is irregular; and that the appointment was irregular. Still, the intestate, Perkins, accepted the appointment and acted under it, and the other defendants enabled him to do so by becoming his sureties for the faithful discharge of his duties. The act never intended, that the funds should pass into the hands of the Board without some security for its due and proper disbursement. With *this* view of the bond before us was taken. If the act had been entirely silent as to the taking of any bond, still the one before us would be good as a common law bond. To suffer this defense to prevail on either ground taken would be encouraging a fraud upon the State. The intestate, Perkins, acting under an authority duly authorized to make the appointment, is *de facto* Chairman of the Board, a public officer, and as such gives a bond to the State, "that he will well and truly execute the office of Chairman of the Board of Common Schools, and faithfully discharge the trust reposed in him," &c. One of the duties of his office or as a member of the Board, is to receive the money belonging to the Board, and to disburse it according to law. This is public money, money belonging to the State, and by her appropriated in the County of Pasquotank to a purpose the most beneficial to its citizens, the diffusion of education through all conditions of the people. "We do not, then," (in the language of the Court in *McAlpin's* case,) "look back beyond the bond itself to see, whether the Chairman rightfully undertook the duties of the office."

Although the bond may not have been given in the way directed, the State must be willing to take it as given, rather than have no security. The bond is a public bond given to the State for her use, and was duly accepted by the Board of Superintendents; and the assent of the sovereign must be inferred until the contrary is shown, and the sureties are bound.

We concur in the opinion given below.

PER CURIAM. Judgment affirmed.

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THE STATE v. GEORGE BOYETT.

When a man is indicted, under the statute, for "knowingly *and fraudulently* voting at an election," when he is not qualified to vote, he cannot justify himself by shewing that he was advised by a very respectable gentleman that he had a right to vote; for the maxim that "ignorance of the law excuses no man," applies as strongly to this case as to any other.

The case of the *State* v. *Dickens*, 1 Hay., 406, cited and approved.

Appeal from the Superior Court of Law of JOHNSTON County, at the Fall Term, 1849, his Honor, Judge *Battle*, presiding.

The defendant was indicted for voting, knowingly and fraudulently, at a constable's election, held for one of the captain's districts in the county of Johnston, in January, 1849. On the trial, it was proved, that the defendant voted for constable in the district mentioned in the indictment, having been a resident in the said district for less than six months, immediately preceding the said election. It was also proved, that he did not mention the

fact of his non-residence for six months to the inspectors of the polls of the said election, and that they did not know of such want of the requisite time of residence. The defendant offered to prove, that, before he gave his vote, he took the advice of a highly respectable and intelligent gentleman as to his right to vote; that the said gentleman advised that he had a right so to vote; and that he voted in consequence of such advice. The gentleman consulted was admitted not to be a gentleman of the bar.

The counsel for the defendant insisted that the testimony was competent to show that he had not voted fraudulently, but in good faith.

The court held that the testimony was inadmissible, and that it would have been so, even if the gentleman, whose advice was taken by the defendant, had been a member of the bar; that the defendant was bound to know the Constitution and laws of his country; and that ignorance of them in him and his advisers would not excuse, though it might be proper to be heard by the court, after conviction, in mitigation of the punishment. The court expressed the further opinion that, if the defendant had voted in ignorance of a matter of fact, or had stated truly and fairly the facts of the case to the inspectors, and they had decided in favor of his voting, then he could not be deemed guilty.

The defendant was convicted, fined six-pence and costs, and appealed.

*Attorney General*, for the State.

*H. W. Miller*, with whom was *J. H. Bryan*, for the defendant, submitted the following argument:

The words of the act of 1844–5 are, "If any person shall hereafter knowingly and fraudulently vote at any election, who by law shall not be entitled to vote at such election, he shall," &c. Iredell's Man., 91.

So far, it follows the language of the penal statute, passed 1777, (Rev. Stat., Ch. 52, Sec. 20,) against illegal voting, except that the words, "knowingly and fraudulently," are not in *that* act.

It is submitted that the offence intended to be created by the statute is the *fraudulent* voting at an election. There must not only be an *illegal* voting, but, coupled with it, a *fraudulent purpose* and *intent*.

If the legislature meant to punish the *act* of voting, "not being entitled to vote," excluding all inquiry into the *intent*—the *motive* of the voter, why use the terms, "knowingly and fraudulently?" Its meaning could have been much more clearly expressed by adopting the words of the penal statute of 1777.

These words are *material*. Without them an indictment would not be good. 3 Bacon's Abt., 569, Indt.

If the *intent*—the *quo animo*, be not of the essence of the offence, then the defendant is shut out from *all* evidence, when it has been established, that he voted, "not being entitled to vote." But it is admitted that he can shew a mistake in matters of *fact*, as that he voted under a deed calling for fifty acres, when there was a less number—or that he was mistaken in his age. What is the object of such evidence, if not to explain the *intent* of the voter? But if the intent is of no importance, and the offence was complete when the illegal vote was given, no matter what the motive, then *such* evidence would be wholly irrelevant.

Let it be conceded that the case is made out against the defendant, when it is proved that he voted, "not being entitled to vote," still, is he precluded from shewing that he voted under an honest, a *bona fide* belief that he had a right to vote?

The maxim, "*ignorantia juris non excusat*," does not apply to offences created by statute, where the intent—the *quo animo*, is the proper inquiry for the jury. But if it

applies to all, then, it is submitted, it does not extend to mistakes and ignorance of collateral questions of law, such for instance as questions of title—the legal effect of deeds and wills—the validity of the probate of such writings, &c.

The evidence offered in this case was not intended to shew ignorance or mistake of the law, *creating the offence*, but assuming that he knew the provisions of the act of 1844–5, it was offered to show that he sought information as to his right to vote, and that, acting under this information, although he voted, "not being entitled to vote," yet he did not thus vote "*knowingly and fraudulently*." Of course it would be for the jury to say whether the information was sought for, and acted upon, in good faith.

This Court has decided that the deed of a *feme covert*, whose private examination has been irregularly taken, is void. Would a defendant indicted for voting in the senate be precluded from shewing such a deed in evidence, in connection with the fact that he had often voted under it before? Would evidence going to show that he had, at a previous election, exhibited the deed to the poll holders, and they had permitted him to vote under it, be excluded?

This Court has repeatedly decided that a sale under a *fi. fa.* bearing *teste* after the death of the defendant therein, his heirs not having been made parties, is void, and the purchaser acquires no title. Would the sheriff's deed in such a case, with evidence of possession under it for years, be rejected when offered in behalf of a defendant, indicted for a vote cast under such a deed?

Other cases could be put, going to show that the exclusion of evidence of a *bona fide* mistake or ignorance of the qualifications of voters would give the act of 1844–5 a severity, which was not intended by the legislature.

Some such cases might be drawn from the opinions and practice, which prevailed amongst the most enlightened

men of the state, in reference to the right to vote as between grantor, trustee, and *cestuis que trust*, especially before the able opinion of this Court (delivered by the Chief Justice) under a request from the senate, at the last session of the legislature.

Had the senate, in the case of the contested election, which was before them, decided the question of law for itself, and passed a resolution that, in its opinion, the trustee alone was entitled to vote, would such a trustee thus voting, and indicted under the act of '44–5, be excluded from evidence, shewing, that immediately before his vote was cast, that resolution was read to him from the journal of the senate?

Would it avail a defendant nothing to shew, that, being illiterate, he asked one of the poll holders, when not acting in his official capacity, to read the law, defining the qualifications of voters, and he read it purposely *wrong*, by which he was deceived and led to cast an illegal vote?

It is conceded by the State that had the defendant submitted the question of his qualifications to the poll holders, and they had passed upon it officially, and allowed him to vote, this would have excused him, *because* their decision is *final*. It is submitted, this is not the reason why their decision can be given in evidence: but that it is admissible to shew the *intent* of the voter; for if it were otherwise, and as contended for, then the most flagrant frauds upon the ballot-box would go unpunished—the most cunning imposition upon the poll holders could be practiced with impunity, provided a favorable opinion be obtained from them, acting in their *quasi* judicial capacity.

But there are analogous principles of law, which may serve us.

In *perjury* it is necessary to aver and prove, that the oath was taken "*willfully* and *corruptly*," for, "if done

from inadvertence or mistake, it cannot amount to voluntary or corrupt perjury." Arch. Crim. Law, 428.

B. is indicted for stealing the horse of A. It being necessary to prove property in A., he is examined for that purpose. Subsequently he is indicted for perjury. Would evidence, shewing that he was mistaken in the legal effects of a deed under which he claimed the property, be rejected? Would the deed itself, though *void* or of no legal effect, be excluded?

A defendant is arrested under a *ca. sa.*, files a schedule and swears to it. He is indicted under the 17th section of the act for the relief of Insolvent Debtors. Rev. Stat., ch. 58. The State proves that he left out of the schedule certain property, which came by his wife; would the defendant be precluded from exhibiting in evidence a marriage settlement, which appears to be void as against creditors, under the decision of this Court in the case of *Smith* v. *Castrix*, 5 Ire., 518? Would the court reject such evidence when offered to shew, that the oath was not taken "willfully and corruptly?"

The principles laid down in the case of *Saunders* v. *Smallwood*, 8 Ire., 125, may afford some aid under this view of the case. That was an action of debt on a bond, and a plea of a certificate of bankruptcy to the defendant, as a voluntary bankrupt. The plaintiff replied, that, at the time the defendant exhibited his petition in bankruptcy, he was seized of certain property which he did not set forth in the petition, or any inventory annexed, *but fraudulently concealed the same, &c.* The case was brought up to this Court upon facts agreed, from which it appeared, that, before the marriage of the defendant, there was a settlement of property on his wife, which was proved before the clerk of the county court and on that account void against the husband's creditors. It was contended for the

plaintiff, that the defendant was presumed to know the legal effect of the probate of the deed, and ignorance of the law did not excuse him. In delivering the opinion of the Court, his Honor, (the Chief Justice,) after declaring the deed void in law against the defendant's creditors, says: "But admitting the property to have been in the defendant for the benefit of his creditors, it is not the necessary consequence, that his certificate of bankruptcy can be impeached and avoided, for the omission to insert that property in his inventory, or otherwise disclose it to the court sitting in bankruptcy. For such omission *may have been innocent, as the defendant might not have been aware of the legal insufficiency of the probate*, or indeed might not have known how, in point of fact, the deed was proved, and the act of congress does not invalidate the discharge for every omission of property, but only *for some fraud or willful concealment of property*," &c.

To constitute *larceny* the taking must be *felonious*. It is the peculiar province of the jury to decide upon the *intention* of one charged with larceny. 2 Star., 827.

"It is a good defense in larceny to shew that the taking was *bona fide*, under a supposed claim of right, *however unfounded such claim may be*." 2 Starkie, 828.

Under this principle, the court would not reject evidence "of claim of right," founded upon a deed, void in law, but which the defendant had been advised was good, and gave him a valid title. Such proof would go to repel the *animus furandi*.

It is submitted in conclusion, and with due deference, that the effect of the principle laid down by the learned judge below, is to strike out from the statute the words *knowingly and fraudulently*, and thereby to place mistake and fraud, misjudgment and villainy, on the same footing. Such was not the intention of the legislature. It had already provided a penalty against *illegal* voting, whatever the *intent* of the voter. This was an ample provision against voting, "not being entitled to vote,"

where the purpose was honest; but it was not sufficient punishment where the object of the voter was fraudulent and corrupt. This defect the act of 1844–5 was intended to supply.

To place the construction contended for on this act, would not diminish the number of fraudulent and dishonest voters—whilst it would drive from the polls many upright men, who, though told by the best advisers that they are legally entitled to vote, will forego the privilege, before they will run the risk of an indictment under this statute.

PEARSON, J. "*Ignorantia legis neminem excusat.*" Every one competent to act for himself is presumed to know the law. No one is allowed to excuse himself by pleading ignorance. Courts are compelled to act upon this rule, as well in criminal as civil matters. It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment, that would be introduced into every trial, by conflicting evidence upon the question of ignorance.

In civil matters, it is admitted, the presumption is frequently not in accordance with the truth. The sales of property are complicated systems—the result, "not of the reason of any one man, but of many men put together;" hence, they are not often understood, and more frequently not properly applied, and the presumption can only be justified upon the ground of necessity.

But, in criminal matters, the presumption most usually accords with the truth. As to such as are *mala in se*, every one has an innate sense of right and wrong, which enables him to know when he violates the law, and it is of no consequence, if he be not able to give the name, by which the offence is known in the law books, or to point out the nice distinctions between the different grades of

offence. As to such as are "*mala prohibita*," they depend upon statutes printed and published and put within the reach of every one; so that no one has a right to complain, if a presumption, necessary to the administration of the law, is applied to him. To allow ignorance as an excuse would be to offer a reward to the ignorant.

The defendant voted, when he was not entitled by law to vote. He is presumed to know the law. Hence, he voted, knowing that he had no right, and acting with this knowledge, he necessarily committed a fraud upon the public—in the words of the act, he *knowingly* and *fraudulently* voted when he was not entitled to vote. It being proved on the part of the State that he voted, not having resided within the bounds of the company for six months next preceding the election, a case was made out against him.

He offered to prove, for the purpose of rebutting the inference of fraud, that he had stated the facts to a respectable gentleman, who advised him he had a right to vote. His Honor held the testimony inadmissible. We concur in that opinion. The evidence had no tendency to rebut the inference of fraud, for the inference was made from his presumed knowledge of the law, and that presumption could not be met by any such proof, without introducing all the evils, which the rule was intended to avoid. The question, in effect, was. Shall a man be allowed, in excuse of a violation of the law, to prove, that he was ignorant of the very law, under which he professed to act, and under which he claimed the privilege of voting? If he was not ignorant of the law, and that he cannot be heard to allege, then, he voted *knowingly*, and, by necessary inference, *fraudulently*.

An indictment for extortion charges, that the defendant received the fee "unlawfully, *corruptly*, *deceitfully* and extorsively." This averment the State must prove. It is done by showing, that the defendant received what the law does not allow him to take: for, the presumption

is, "he knew the law upon the subject of fees to be taken by himself," and the inference from such knowledge is, that he acted "corruptly and deceitfully," (words quite as strong as knowingly and fraudulently,) unless it is shown, that he did so by some inadvertence, or mistake in calculation. He cannot excuse himself for taking more than the legal fee, by saying, that he was misled by the advice of an attorney. If such, or the like excuses were admitted, it would hardly ever be possible to convict. He might always contrive to ground his conduct upon misapprehension or improper advice. *State* v. *Dickens*, 1 Hay., 406.

It would be a different question, if the defendant had stated the facts to the judges of the election, and they had decided in favor of his right to vote, for their decision would rebut the presumption of knowledge on his part, in a manner contemplated by law.

The case was ably argued for the defendant. It was insisted, that it was necessary for the State to aver and prove, that the defendant voted knowingly and fraudulently. That position is admitted. The reply is, the averment was made and proved; for, proof being made that he voted when he was not entitled to vote, the presumption is, that he knew the law, and *fraud* is the necessary inference, as corruption and deceit were in the case above cited. It cannot be contended, that to fix him with knowledge, the State must show, that some one read and explained the law to him; or to fix him with fraud, that it must be proven, he had been bribed. If so the statute is a dead letter.

Our attention was called to the fact, that the act of 1844, making the offence indictable, uses the words, "knowingly and fraudulently," which words are not used in the act of 1777, imposing a penalty.

To incur the penalty under the act of 1777, the voting must be unlawful, and it must be done knowingly and

fraudulently in the sense above explained. If one, having a deed for fifty acres of land, votes in the senate, and it turns out that the deed only contains forty-nine acres, the penalty is not incurred, unless he knew the fact at the time he voted. So, if one votes for a constable, and it turns out that the dividing line includes him in another company, the penalty is not incurred, unless he knew the fact or believed that the true line put him in the other company. There is not in either case that criminal intent, which is a necessary ingredient of the offence, whether it be punished by a penalty or by indictment. The act of 1844 expresses in so many words what the law would have implied. It is a strained inference, that, by so doing, the legislature intended to make the case of illegal voting an "*exception*," and to take it out of the rule "*ignorantia legis*," a rule which has always been acted upon in our law, and in the laws of every nation, of which we have any knowledge, and without which, in fact, the law cannot be administered. The inference sought to be made results in this—the legislature did not intend the act of 1844 to be carried into effect—it was intended to be "*brutum fulmen*." No reason has been suggested for making an exception in this case. The only additional qualification, to that of a voter for a member of the house of commons, is a residence of six months in the captain's company. This is not complicated or difficult to be understood. Why make the exception and offer a reward for ignorance in this particular case? Such a construction cannot be admitted, unless the law-makers had declared their intention by positive enactment.

PER CURIAM. There is no error in the court below and the same must be so certified.

WILLIAM A. ROGERS v. CHARLES A. NUTTALL'S ADM'R, &c.

Where a constable, in whose hands a judgment had been placed for collection received in payment sundry notes of hand, and afterwards paid over the amount in money to the plaintiff in the judgment; *Held*, that the constable could not afterwards recover, in the name of the plaintiff, the amount of the said judgment from the defendant in the judgment, although he could show that the notes received from the defendant were on insolvent persons and fraudulently passed to him.

Appeal from the Superior Court of Law of GRANVILLE County, at the Special Term in June, 1849, his Honor, Judge *Settle*, presiding.

The action is in debt to recover the sum of one hundred dollars. The facts are as follows: The plaintiff's intestate was the owner of a justice's judgment, obtained against the defendant for the above-named sum. An execution was issued, and by him put for collection into the hands of one Landis, a constable. Landis, in discharge of the execution, received from A. L. Walker, one of the defendants in the execution, a number of promissory notes upon other persons. These notes were received by the constable as money. Subsequently the intestate warranted Landis and his sureties, for the sum of one hundred dollars, "due by money collected," and obtained judgment, from which an appeal was taken to the county court. There the cause was referred to arbitrators, who awarded the plaintiff one hundred dollars, the amount claimed in the warrant, which was confirmed by the court and judgment given. The amount so recovered was paid to the plaintiff by the constable. This action is brought on the

judgment originally obtained by the intestate against these defendants. The plaintiff's counsel prayed the court to instruct the jury, "that Landis, the constable, could not compound the plaintiff's execution against the original defendant, nor take anything in satisfaction thereof but money, unless with his approbation, so as to extinguish the claim against the defendants; and that the recovery by means of the award, was in the nature of liquidated damages for the default of the officer, but did not satisfy the judgment." The court refused so to charge.

There was a verdict for the defendants and the plaintiff appealed.

*Graham*, for the plaintiff.

*E. G. Reade*, for the defendants.

NASH, J. We think the court below decided correctly. The instructions prayed were so framed, that the court was at liberty to refuse both; they were joined together and formed but one. No complaint is made, as to the charge actually given. It must therefore be considered as correct in law; and the only inquiry is, whether the court erred, in refusing the instructions as prayed for. It is the privilege of parties to call the attention of the court, particularly, to such points as they deem important. But in framing the required instructions, they must be careful not to join together things that are proper with those that are not proper: if they do, there is no error in law in refusing the whole. The first part of the instructions required the court could not give. Whether the execution was returned, by the constable Landis, satisfied or not, the case does not inform us; but it does distinctly state, that the notes were received by the constable, from one of the defendants, as money in satisfaction of it. This he had power to do. And as far as the defendants in the

execution were concerned, the plaintiff was bound by his acts, in this particular, if he ratified it. His claim upon the defendants on that judgment was extinguished. *Wilson* v. *Coffield*, 5 Ire., 515. The plaintiff, however, was not bound to receive the notes taken by the constable in the place of the money, called for in the execution, unless he had authorized him so to do. And if the money was not paid, on demand, he could sue him for money had and received to his use, and his sureties would also be answerable for the amount. This course the plaintiff has pursued. He has chosen to consider the money upon the execution as in the hands of the constable. He warranted him and his sureties "for money collected," recovered a judgment and has received his money. It is precisely the same as if Landis, without a suit, had paid him over the amount upon the execution. But, it is said, the money paid by Landis, was for damages for a breach of duty. This cannot be so. A single magistrate has no jurisdiction of the question of damages. The warrant, which is the plaintiff's declaration, calls for one hundred dollars, "due by money collected"—collected from whom? from the defendants, and upon the execution; for there is no pretense that the plaintiff had any other claim against him. The plaintiff's execution is paid and discharged, and he cannot maintain this action. Something was said in the argument here as to the illegality of the award. With that we have nothing to do. The money was paid by Landis, not on the award, but on a judgment of a court of competent jurisdiction.

His Honor committed no error in refusing the instructions required.

PER CURIAM. Judgment affirmed.

THE STATE v. JAMES ROBERTS.

Where a single woman became pregnant in the county of Brunswick, where she had always resided, and went to New Hanover county, where she was delivered of the child, and then returned with her child to Brunswick; *Held*, that the justices of Brunswick had the jurisdiction, under the Bastardy Act, to institute proceedings to subject the reputed father to the maintenance of the child.

Appeal from the Superior Court of Law of BRUNSWICK County, at the Fall Term, 1849, his Honor, Judge *Dick*, presiding.

This is a proceeding under the Bastardy Act, to subject the defendant, as the alleged father of the illegitimate child of one Zilpha Robbins, to its maintenance. The defendant and Zilpha Robbins, both lived in the county of Brunswick—the latter being a native of it—and while in that county, she proved to be with child. During her pregnancy, she went into the county of New Hanover, where the child was born. While she resided there, proceedings were had against her under the act, and a warrant was issued against the defendant, upon the charge of being the father of the child. What was the result of these proceedings the case does not state. Subsequently, the woman returned with the child to Brunswick county, but, when, is not stated, and these proceedings were instituted. On behalf of the defendant, it was objected, that the justices of Brunswick county had no jurisdiction of the matter, as the warrant was not issued, while the woman was pregnant, but after the birth of the child in New Hanover. Upon this question the whole contro-

versy turned in the county and superior courts, and the latter court having overruled the defendant's objection and directed a *procedendo* to the county court, he appealed to this Court.

*Attorney General*, for the State.
*Strange*, for the defendant.

NASH, J. There is much apparent force in the objection urged by the defendant's counsel in this case. The words of the statute, under which these proceedings take place, are, " Any two justices of the peace, upon their own knowledge, or information made to them, that any single woman within their county, is big with child, or delivered of a child," &c. Rev. Stat., ch. 12, sec. 1. It is insisted, that, to give the justices of the peace of any county authority to proceed under the act, the warrant must be issued, either while the woman is pregnant, or, if after the birth, in the county where that takes place. We do not accede to this construction. The words " within their county " are not necessarily connected by the conjunction, *or*, with the words " delivered of a child. " This will be more clear, if the ellipsis after the conjunction is supplied, as it ought to be. It would then read, " or has been delivered of a child. " And if a literal adherence to the phraseology of the act be insisted on, we do not think it would assist the defendant. The woman had been or was delivered of a child, which was likely to become burthensome to some county. This is not a penal act, but one of police regulation, and ought to receive such a construction, as will carry out the intention of the legislature and facilitate its execution. An unfortunate being of this description, being in the eye of the law *filius nullius*, becomes in the eyes of humanity *filius populi*, and the public is bound to take care of him, at a period of his life, when he cannot, in the nature of things, pro-

vide for himself. To take this burthen from those who have not participated in the offence, and place it on him, upon whom it ought to rest, is the object of the act. In carrying it into execution, the first inquiry is, where does the jurisdiction rest? Certainly where the law, in the first instance, casts the burthen, that is, where the mother lives. Cases of this kind are not strictly cases of settlement, yet they are strongly assimilated to them. All children, except bastards, have their primary settlement in their father's parish; the latter, in general, where born. In cases of fraud, however, where an attempt is made, illegally, to shift the burthen of maintenance, the bastard will be settled in the parish of the mother, whence she was improperly removed. As when, after pregnancy, the woman is sent in by the order of justices, or comes as a vagrant, to a parish, to which she does not belong, and drops her child there. 1 Bl. Com., 459. In *Wood's* case, 1 Sal., 121, the above doctrine was affirmed. A woman big with child was removed by order of two justices from A. to B., and was there brought to bed. B. appealed, and the woman was sent back to A., and, by the court, "so ought the child, for all was suspended by the appeal, and now the mother's right of settling on B. is avoided *ab initio.*" So in *Costham's* case, 122nd page of the same reporter. The woman was removed by an order of two justices from Westbury in Wilkshire to Costham, and there was brought to bed. At the next sessions, Costham appealed and the order was reversed. Afterwards, by order of two justices of Westbury, the child was sent to Costham; they appealed and the order was confirmed. At last, in the language of the reporter, "all was removed into the King's Bench. *Et per curiam.* The birth at Costham did not settle the child there, because Westbury unjustly procured the mother to go there." From aught that appears in the case, the woman, Zilpha Robbins, went into the county of New Hanover for the sole pur-

pose of being delivered. She was a native of Brunswick county and had lived there all her life. How long she remained in New Hanover the case does not disclose, but she returned to her native county, and in all probability is still there. If she went to New Hanover, with the purpose of throwing the burthen of the maintenance of her child upon that county, or was induced to do so with the view to screen the father of her child, or to render it more difficult to fix the paternity upon him, in either case the act was illegal, and the child after its birth would follow the settlement of the mother. So, if she went to New Hanover for any other purpose, as on a visit. If this were not so, constant attempts to evade the law would be made by those whose interest or reputation was endangered by an exposure. Any justice of the peace for New Hanover, upon complaint made to him on oath, by any warden of the poor, would have been justified in sending Zilpha Robbins back to Brunswick. Rev. Stat., ch. 89, sec. 17. The object of the Bastardy Act was to shift the burthen of maintaining the child, from the innocent many to the guilty *one*. If the county fails to fix paternity upon some one in particular, or having fixed him, he is unable to give the requisite security, and the mother be unable, the county must provide for the maintenance of the bastard until he reaches an age when he may be bound out.

RUFFIN, C. J. The Bastardy Act directs any two justices of the peace to cause any woman "within their county," who is big with child, to be brought before them in order to charge the father; and in the fourth section requires the person found to be the father, "to give bond to indemnify the county, when such child shall be born," for the maintenance of the child. The argument for the defendant is, that the case has not occurred in which the defendant is chargeable in Brunswick, because in point

of fact the child was born in New Hanover. It is true, the act literally does not cover the case, but in its just interpretation it does. The act prescribes certain police regulations, of which the great purpose is to ascertain the father of a bastard, and to relieve the county from its support, by charging the father with it. In most cases the county of the mother's residence will be that of the birth of the child, and therefore the language of the act is directed to the state of facts. But the scope of the act is to indemnify the public—whatever county may legally be chargeable with the maintenance of the child. That is the substance of the provision. Now, although the periods of the removal of the mother and the birth of the child are not here expressly stated, yet enough appears to show conclusively, that Brunswick was chargeable; for the mother became pregnant there, and the child must have been born before the mother could have acquired a domicil or settlement in New Hanover, for which a year is requisite. Rev. Stat., ch 89, secs. 16–17. The woman might, indeed, and ought to have been compelled to charge the defendant before she left Brunswick; and if she had, surely the law would not put it in her power, by going over the line to be delivered, to relieve her paramour from the charge of his issue, and throw it on the county. It would be equally against the sense of the act to enable her to do so by absenting herself from the county, before she had borne the child, for the purpose of being delivered, and then returning with the child. For these reasons I think the judgment was founded upon the true construction of the statute, and ought to be affirmed.

PER CURIAM. Judgment affirmed.

LUCY T. PEACE v. JONATHAN JENKINS.

A party may give in evidence the declarations of a deceased person, made against his interest, upon the subject matter in controversy.

The case of *Peck* v. *Gilmer*, 4 Dev. & Bat., 257, cited and approved.

Appeal from the Superior Court of Law of GRANVILLE County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

This was an action of replevin, brought to recover a negro boy by the name of Peyton.

The plaintiff claimed under a bill of sale from her father, John T. Peace, dated the 4th day of May, 1844.

The defendant claimed, as purchaser under an execution against one N. B. Patton and the said John T. Peace, tested of the ..... term of Granville county court, A. D., .....

The plaintiff offered evidence to prove that the consideration mentioned in the bill of sale was a fair one, and that the same was paid, part in money and part by assuming debts of her father. Amongst these debts was one alleged to be due by John T. Peace to Josiah Peace, his brother.

The defendant offered evidence to prove, that the bill of sale from John T. Peace to Lucy T. Peace was fraudulent, and, in order to impeach the existence of the debt alleged to be due from John T. Peace, and to show that the said debt was fraudulent, the defendant offered in evidence a deed of trust made by the said John T. Peace in November, 1843, to secure certain debts therein mentioned, in which the debt to Josiah Peace was not mentioned, and

that at the time of the execution of the said deed, the said John T. Peace declared that the said deed contained all the debts he owed. For the purpose of showing that the said debt was not a feigned one and to rebut the fraud alleged, the plaintiff offered to prove by a witness, (John W. Jenkins,) that some years before the date of the said deed of trust, John T. Peace, (who was dead,) had said in a conversation with the witness, that he wished to borrow some money, that he knew his brother, the said Josiah, had it, but that he disliked to apply to him, because he already owed him. This testimony of the witness, John W. Jenkins, was objected to by the defendant, but was received by the court. A verdict was rendered for the plaintiff, and judgment entered thereon. A new trial was moved for and refused, and appeal prayed and granted.

*J. H. Bryan* and *H. W. Miller*, for the plaintiff.
*Gilliam* and *Badger*, for the defendant.

NASH, J. The question is not as to the weight, but as to the competency of the evidence, of which the defendant complains. On his part it was alleged, that the transaction between the plaintiff and her father, John T. Peace, was fraudulent. The plaintiff's deed, being attacked for fraud, it was incumbent on her part to show, that the consideration was a *bona fide* one. A part of this consideration consisted of a debt, as she alleged, due from her father to Josiah Peace his brother, and which she had paid. The bill of sale, under which she claimed the negro, is dated the 4th of May, 1844. Declarations of John T. Peace, made near six months before, were proved by the defendant to show, that at *that* time he owed his brother Josiah nothing. To contradict the force of this testimony, the plaintiff was permitted to show that, some

time previous to the declarations proved by the defendant, John T. Peace had declared that he was indebted to Josiah Peace. The testimony was, we think, competent. John T. Peace was dead, and his declarations were relevant to the very matter in dispute, to-wit, his indebtedness to Josiah Peace, and upon a question of fraud and against his interest. Its aptness to prove that fact of indebtedness was to be considered of by the jury in deciding on its weight, from the time and circumstances under which it was made. *Peck* v. *Gilmer*, 4 Dev. & Bat., 257; *Higham* v. *Ridgeway*, 19 East., 109. We think his Honor committed no error in admitting the testimony. It is true, it did not of itself *prove* any such debt existing at the time the plaintiff's bill of sale was made, but it was such a circumstance as the jury might take into consideration as evidence, either in chief or in reply. The declarations were made by a man, upon the subject in controversy, against his interest, and when he could have no conceivable interest to declare that which was not true. Suppose he had at that time given his due bill for the amount so alleged to be due to Josiah Peace; that, certainly, would have been evidence.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF T. C. HOUSER, et al. v. EWELL BELTON.

Where a deed described a corner as being on the *east* side of a creek, it is admissible for the party, by competent testimony, to show that the corner was in fact on the *west* side of the creek.

The case of *Person* v. *Rountree*, 1 Hay., 378, cited and approved.

Appeal from the Superior Court of Law of SURRY County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

This was ejectment. The lessor claimed under a deed from one Gittens, dated in 1822, under which possession had been held for more than twenty-one years. The deed described the land as lying on both sides of Loven's creek—beginning at a white oak on the *east side of Loven's creek*, thence south 55 chains to a post oak—thence east 100 chains to a white oak, thence north 55 chains to a white oak, thence to the beginning, containing 550 acres.

The plaintiff insisted that the beginning corner was at a white oak stump on the *west* side of the creek, and that it was described as being on the *east side* by mistake.

If the corner was at the stump, the plaintiff was entitled to recover; otherwise his title did not cover the land sued for.

The second, third and fourth corners were established. The point of intersection, by running from the fourth corner west, and from the second corner north, (reversing the course of the first line,) was at the white oak stump, and the distance of these two lines gave out within

a few feet of the stump. A witness testified, that, many years ago, his father, who is now dead, pointed out to him a white oak tree, which was marked for a corner, and told him it was the corner of the lessor's land. The witness stated, that several years ago the tree was cut down by one Wright, when clearing land. The corner contended for by the lessor was the stump of that tree. The witness further stated, that Wright had also cut down a line tree between the white oak stump and the creek, and that both the white oak corner and the line tree were on the west side of the creek.

The defendant insisted, that the calls of the deed could not be controlled by such testimony, and the beginning corner must be on the east side of the creek.

The court charged, that, if the evidence satisfied the jury that the white oak, of which the stump was the remains, was marked as the corner of the lessor's land, it would control the word "east," and fix the lessor's corner on the west side of the creek, and the plaintiff was entitled to recover.

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

*Iredell*, for the plaintiff.

No counsel for the defendant.

PEARSON, J. The opinion of his Honor is fully sustained by many decisions. The question is simply, whether a party is at liberty to show, by the kind of proof offered in this case, that there was a mistake in using the word "*east*," instead of the word "*west*." It is not a question between a marked tree and a natural boundary, but between a marked tree and a mere *word*.

When a creek is called for as a boundary, it will control course and distance and even marked lines and corners, because it is permanent and fixed, and a thing,

about which there can be no mistake. It is a natural boundary. Marked lines and corners control course and distance, because a mistake is less apt to be committed in reference to the former than the latter. Indeed, the latter is considered as the most uncertain kind of description; for, it is very easy to make a mistake in setting down the course and distance, when transcribing from the field book, or copying from the grant or some prior deed, or a mistake may occur in making the survey, by losing a stick, as to distance, or making a wrong entry as to course. For these reasons, when there is a discrepancy between course and distance and the other descriptions, the former is made to give way.

All the reasons for making course give way to a natural boundary, or to the lines of another tract, or to marked lines and corners, apply with full force to the present question. The deed describes the beginning corner as being on the east side of the creek; the proof shows the corner tree to be on the west side. The marked tree must control, because there is less liability to mistake about it, than in the use of one word for another, and the discrepancy shows there must be a mistake in the one or the other.

In the leading case, *Person* v. *Roundtree*, 1 Hay., 378, the course of the first line was "*north*" from a creek, so as to put the whole tract on the north side. The marked line ran "*south*" from the creek, so as to put the whole tract on the south side. It was held, that the course of the first line had been written *north* instead of *south* by mistake, and the marked lines controlled. There is the same reason for holding in this case, that "*east*" had been written instead of "*west*," and the marked course must control.

PER CURIAM. Judgment affirmed.

ISAAC EDWARDS v. ALVIN BENNETT, et al.

On a petition for the partition of slaves, when the defendant denies the petitioner's right and insists that he (the defendant) is entitled to the slaves in severalty, it is not necessary for the petitioner, as in the case of a petition for the partition of land, to establish his right at law, before the relief he seeks can be granted. The court, in which the petition is filed, must decide the question of right.

Appeal from the Superior Court of Law of CHATHAM County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

The petitioner alleges, that he is the owner of one-half of certain slaves, a tenant in common with the defendants, and prays for a decree of sale in order to effect a division. The defendants deny the title of the petitioner, and allege, that one of the defendants is the owner of the slaves in severalty and has the exclusive possession. They admit, that in August, 1841, they executed an instrument to the petitioner and one Riggsbee, purporting to be a conveyance, or, more properly, a covenant for a conveyance of the slaves, but aver, that it was obtained by "fraud and deception and without consideration, and is, therefore, void." They also insist, that Riggsbee is a necessary party.

At August term, 1845, of the county court of Chatham, the following issue was submitted to a jury: "Is the petitioner the owner of one-half of the slaves, Judy, &c., or not?" The jury found the petitioner is the owner of one-half of the slaves. Whereupon the court made a decree for a division, and the defendants appealed.

At Fall term, 1849, of the superior court, the petition was dismissed on motion of the defendants, and the petitioner appealed.

In the case sent to this Court, it is stated, "that, by the admission of the parties, the defendants before and on the 9th of August, 1841, were the owners of the slaves: that on that day they executed under their hands and seals an instrument, which has been duly proven and registered, in these words:

"NORTH CAROLINA,
"Chatham County.

"Know all men by these presents that I, Alvin Bennett, and Winniford Bennett in Co. with Alvin Bennett of the county of Chatham and state aforesaid, for and in consideration of one hundred and fifty-seven dollars in hand paid by the said Isaac Edwards and Thomas Riggsbee Co. with him the said Isaac Edwards, the receipt is hereby acknowledged by both of the sum of one hundred and fifty-seven dollars, and our note of ninety dollars on demand, have granted, bargained and sold, and conveyed unto Isaac Edwards and Thomas Riggsbee, three negro slaves, Judy, Eliza and Harrison, we sell and confirm unto Isaac Edwards and Thomas Riggsbee, one-half of these above-named negroes at public sale or valued by two good men, aged about thirty Judy, Eliza aged three years old, Harrison aged about eleven months old, to have and to hold from any claim or claims whatever, free and fully discharged from any incumbrances that may accrue hereafter, we Alvin Bennett and Winniford Bennett, doth warrant and defend the title of said negroes, half of them to be good and from any lawful claim whatever may accrue. In testimony whereof, we, Alvin Bennett and Winniford Bennett, have hereunto set our hands and seals above mentioned, signed, sealed and delivered, this the 9th day of August, 1841."

It is also admitted, that before the filing of the petition, Riggsbee assigned all of his interest to the petitioner.

*Graham*, for the plaintiff.

*Kerr* and *W. H. Haywood*, for the defendant.

PEARSON, J. It is not stated, upon what ground the petition was dismissed. The objection for the want of parties was met by the assignment of Riggsbee. The objection, that the deed was void, "being obtained by fraud and deception," without consideration, (supposing a general allegation of the kind, sufficient to raise an objection,) is not supported; for, the case states no evidence in reference to it. The only remaining objection is, as to the effect of the deed of the 9th of August, 1841. We presume his Honor was of opinion, that the deed was too vague and uncertain to have any operation, or that it was a mere covenant to convey, and therefore the petitioner had no title.

We do not concur in this opinion. The legal effect of the deed was to pass one-half of the slaves. It has proper parties, a consideration, a subject sufficiently certain, and uses apt words of conveyance and apt words of warranty. The only confusion is made by the introduction of the words: "at public sale or valued by two good men." These words, if unmeaning, are to be rejected as surplusage, "*at res magis valeat*," *&c.* The sense is not changed by striking them out. It is probable (if a conjecture may be hazarded) that it was an attempt to provide a mode of division without the expense of legal proceedings; but however that may be, a proper construction of the deed vests the title to the one-half of the slaves in the petitioner, and he has a right to a division.

It was insisted in the argument, that upon a petition for partition of slaves, if the defendant denies that the petitioner is a tenant in common, and sets up a title in himself in severalty, and an exclusive property, the petition cannot be maintained. The case, as made up, does not present this question, but as the question is one of practical importance it is proper to give our opinion. In a bill for partition of land, if the defendant denies the title of the plaintiff, and sets up an adverse possession and a

title in himself in severalty, the court will not proceed until the plaintiff establishes his title by an action of ejectment, as a tenant in common may bring ejectment against his co-tenant, when there is an actual ouster, and such denial and claim set up in the answer is taken to be an actual ouster. But a tenant in common of slaves cannot maintain an action at law against his co-tenant, unless the property is destroyed or carried out of the country. And, if the rule as to land be applied to slaves, there would be no remedy, whenever the defendant denies the tenancy in common. "Where there is a right there must be a remedy;" and *ex necessitate*, the court, in which the petition is filed, upon an adverse title in severalty being set up, must try the title. This is a necessary consequence, in order to give effect to the act providing for the partition of slaves or other chattel property. Rev. Stat., ch. 85, sec. 18. We think the mode adopted by the county court was a proper one to try the title.

It was further objected, that the petition has no prayer for process. Supposing a formal prayer necessary in a proceeding of this kind, it has been waived by the appearance and answer of the defendants.

The decree below must be reversed and the plaintiff declared to be entitled to partition. And as it does not appear, whether there is a necessity for a sale or not for the purpose of making partition, it is deemed most convenient to the parties to remit the cause, so that the partition made be made under the direction of the court below.

PER CURIAM. Ordered accordingly.

SATCHWELL v. RISPESS.

Where a party has not been deprived of his appeal from the judgment of a justice, by any fraud, accident, surprise or denial of his right by the justice, he is not entitled to a writ of *recordari*.

Appeal from the Superior Court of Law of BEAUFORT County, at the Fall Term, 1849, his Honor, Judge *Manly*, presiding.

This was a case of *recordari* to the superior court of Beaufort county.

The affidavit of the plaintiff set forth, that the deceased, his testator, married Sally Ann Rispess, the sister of the defendant, to whom she was indebted, and died in a few days thereafter, she surviving him, and that the plaintiff is the executor. That after the death of the testator, James W. Satchwell, the defendant, on the 27th of September, 1848, caused a warrant to issue against the plaintiff as such executor to recover the said debt, which warrant was served upon him and judgment obtained on the 16th of October following, as he was informed—that the warrant was served on the plaintiff in the town of Washington, from which place he lived twenty-eight miles, and prays that a writ of *recordari* and *supersedeas* may issue, &c. Upon the return of the proceedings in the superior court, the defendant's affidavit was filed. After admitting the debt was due from Sally A. Satchwell before her marriage and the issuing of the warrant, and the obtaining of the judgment, he states that the warrant was served on the defendant on the 16th of October, in the town of Washington; that the plaintiff was, he is informed and believes,

not present at the trial, but was in the town at the time of the trial and did not attend, because he did not choose so to do, and consented that a judgment should be taken. The constable, Patterson, in his affidavit swears, that, when he served the warrant, the petitioner looked at and examined the note, and told him to return it at any time and take a judgment upon it—that he asked him, if he did not wish to enter some plea or pleas as executor, and he answered he did not, and that he is under the impression the plaintiff remained in town more than one day on that occasion—that he had the judgment in his hands some months and that the plaintiff promised to pay it. At the fall term, 1849, of the superior court of Beaufort, the plaintiff Satchwell filed an additional affidavit, in which he states he does not certainly recollect, but he thinks it possible, he was in town on the day of trial; he did not attend the trial, because his regular counsel, Mr. Hawks, and also Mr. Rodman, whom he occasionally employed, &c., were both absent. When the cause was brought to the notice of the court, a motion was made on behalf of the petitioner to transfer the case to the trial docket, and a counter motion on behalf of the defendant to dismiss the proceedings. The court granted the latter and the plaintiff appealed.

*Biggs*, for the plaintiff.

No counsel for the defendant.

NASH, J. In almost every case of a trial before our courts, the legislature has provided a remedy for alleged error, by an appeal to a superior tribunal. This is a right which, in proper cases, cannot legally be denied. If, however, it is denied when it ought to be granted, or from any accident the party complaining has been prevented from attending the trial, or been unable to pro-

cure proper sureties within the prescribed and proper time, or, from any fraud practiced upon him, he has been induced to forego or neglect his right of appeal, a superior court will, upon a timely application, and proper grounds shown, grant him a writ of *certiorari* or *recordari*, as his case may require. (When the court, whose proceedings are sought to be reviewed, proceeds in the matter, not in the course of the common law, and there is no legislative provision for an appeal, the above writs, if not strictly matters of right, are so considered in practice, being issued as matters of course.) In other cases, their ordinary use in this state is as a substitute for the appeal, and, when granted, the case is to be tried *de novo*. (To entitle the applicant to the benefit of the writ, he must show sufficient reasons for not resorting to the remedy provided for him by the statute; in other words, he must explain satisfactorily why he did not appeal.) The plaintiff, in this case, has entirely failed to do so. He does not in his affidavit inform us, whether he was at the trial or not; but states a fact, unimportant in itself, except as leading to the conclusion that he was absent, to-wit: that he lived twenty-eight miles from Washington, where the trial was had, leaving the impression that the distance of his residence from the place of trial was the reason why he did not attend. In this particular, the affidavit, to say the least of it, was unfair. Nor does *he* correct or remove that impression, until his second affidavit is filed. The defendant in his affidavit states, that the plaintiff was in Washington, at the time the trial was had, as he was informed and believes. And the constable, Patterson, swears, that, at the time he served the warrant, he showed the note to the plaintiff, who examined it, and told him to return the warrant at any time and take a judgment: that he asked him if he did not wish to enter some plea or pleas to protect him as executor or otherwise, and that he replied he did not. This affidavit is filed on the 23rd of November, 1849. On

the 25th, two days after, the second affidavit of the plaintiff was filed, in which he states he was not present at the trial, and expressly admits he voluntarily absented himself. The reason he assigns is the absence from Washington of the counsel he had employed to advise him in managing the estate of his testator, with whom he wished to consult as to his liability to pay the debt. It is to be remarked, that, in this second affidavit, he does not contradict a single statement made by the officer, who served the warrant. He chose to absent himself "trusting (in his own language) that the law would provide a remedy if any wrong was done him." The law did provide him a remedy, which he did not choose to claim. And, as he was not deprived of it by any fraud, accident, surprise or denial of it by the court, he is not entitled to the aid of the writ of *recordari*. In addition to this, according to the uncontradicted evidence of the officer, by direction and consent of the petitioner, he returned the warrant and took the judgment, which he held several months in his hands, and which the petitioner repeatedly promised to pay. We are not called upon to say anything, as to the correctness of the judgment.

The writ was improvidently issued, and the petition properly dismissed.

PER CURIAM. Judgment affirmed.

THE STATE v. ALBURTUS L. WATTS.

On an indictment for marrying a female infant under the age of fifteen years, where the defendant relies upon the statute of limitations as to prosecutions for misdemeanors, Rev. Stat., ch. 35, sec. 8, proof that the marriage was by consent of the mother and was solemnized by a minister of the gospel in the presence of six or seven persons, and that the parties lived together afterwards, openly, as man and wife, shall protect the defendant from the operation of the proviso, that the offence was committed in secret.

So where the parties went to an adjacent county to be married and afterwards returned to the county of their domicil, where they lived together as man and wife, the fact being known to the community, and the defendant continuing in the open exercise of his duties as a minister of the gospel, it cannot be held that he absconded from the county, in which he was married, or concealed himself, so as to bring his case within the operation of the second part of the said proviso.

A special verdict is defective which finds only the evidence, from which facts may be inferred. It must find the facts themselves.

It is not necessary nor convenient to introduce, in an indictment for a misdemeanor, to which the statute of limitations applies, averments, with the view of taking the case out of the statute, by bringing it within the proviso.

The case of *Shutt* v. *Carloss*, 1 Ire. Eq., 233; cited and approved.

Appeal from the Superior Court of Law of PERSON County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

The indictment is for marrying one Mary Williams, she being a female infant under the age of fifteen years, and her father not then living. It was found in May, 1849, and contains two counts; both of which state the marriage to have been in Person county, on the 18th day of February, 1832. The first count states further, that on the said day of the marriage, the defendant absconded from that county and had not since returned to it up to the finding of the bill. The other count charges, that the

marriage was in a secret manner, and that the offence was not discovered by the jurors until the day of finding the bill.

Upon not guilty pleaded, a special verdict was found, which, as far as it is material, is to the following effect and substance: That on the 18th day of February, 1832, the defendant and Mary Williams were inhabitants of Caswell county, and entered into an engagement to intermarry: that the father of the said Mary was then dead, and that she was an infant under the age of fifteen years and resided with her mother, who was then a widow, and gave her written assent that the marriage should then be had: that on the 17th day of February, 1832, the defendant applied to the clerk of the county court of Caswell for a license for the marriage between himself and the said Mary, and the said clerk refused to issue it in consequence of information that she was under fifteen years of age, which he received from a near relation of the said Mary: that such was made known to the said Mary and her mother, and that it was thereupon agreed between the defendant and the said Mary, with the knowledge and approbation of her mother, and of several other near relations of the said Mary, that they would go to the house of one Jones, in the county of Person, and there obtain a license and get married; and that, in pursuance of that agreement, the defendant and the said Mary, accompanied by one Lewis, an uncle of the said Mary, and three other persons, in the night of that day left the residence of the said Mary and her mother in Caswell county, and went to the house of the said Jones in Person county, and there, about two hours by sun, in the morning of the 18th day of February, 1832, they obtained a license from the said Jones, who was a deputy clerk of Person county court, and were married by a preacher of the Methodist denomination, who lived in Person, in the presence of the said four persons, and one

Howard, and the said Jones and his family, the said Mary being then under fifteen years of age: that the defendant at the time of the marriage was, and for some months before had been, a preacher of the Presbyterian denomination and was settled as the minister of two congregations in Caswell county, and that the place of worship of one of the congregations was near the line of Person county, and several members of the congregation were inhabitants of Person: that, after the marriage and on the same day, the defendant returned to his place of residence in Caswell with his wife, and the said marriage became generally known there, and the defendant and the said Mary lived in Caswell as man and wife, and, until the death of the said Mary, which happened in October, 1832, the defendant continued to be the minister of the said two congregations and habitually preached to them, and was generally accompanied to those places of worship by his wife: that in the year 1832, after the said marriage, the defendant also preached several times to congregations at the dwelling-house of one Walton in Person county, and during that year and 1833, passed several times through that county on his way to large religious meetings in the county of Granville and in the county of Halifax in Virginia, near the lines of Person, and on those occasions the defendant visited his friends and stayed several nights in succession in Person, and the said marriage was generally talked of in Caswell, Granville, and elsewhere: that since that time the defendant has continued a minister and has served as the pastor of several congregations in divers counties in the state, other than Person; and that his places of residence have been notorious. The special verdict also finds, that at the time of the marriage, the mother was entitled to certain slaves and other chattels during her life, and that the said Mary was entitled to the same in reminder after the death of her mother; and that her mother was

the next of kin of the said Mary at her death, and the said mother died in March, 1848, and that, thereupon, the defendant administered on the estate of the said Mary and claims the said slaves and chattels from the person, with whom the mother intermarried after the said marriage. Upon the verdict judgment was given for the defendant, and the solicitor for the State appealed.

*The Attorney General*, *Graham* and *E. G. Reade*, for the State.

*Kerr* and *Norwood*, for the defendant.

RUFFIN, C. J. The record contains two exceptions on the part of the State to the admission of evidence offered by the defendant. The first was as to the written assent given by the mother; which was received to rebut the allegation of secrecy. The other was as to the evidence of the defendant's continued residence in other parts of the state besides Person, and of the notoriety of the marriage, and of the defendant preaching publicly in counties adjoining Person.

The guilt of the defendant in contracting marriage with a female of tender years, contrary to the statute, seems to be established. Indeed, it was not contested. Supposing the indictment sufficiently states the *corpus delicti*, without averring that the father had not given his consent in writing, as well as his death, the Court is of opinion the judgment was properly rendered for the defendant upon the special verdict, by force of the act limiting the time in which prosecutions for trespasses and misdemeanors shall be commenced. Two years from the commission of the offence is the period prescribed; and the grand jury is forbidden to find an indictment, where the offence was committed longer than that period before the bill found. That is subject to two provisos: the one, that, if the offender shall abscond from the county, in which the offence was committed, or conceal himself, or the

offense shall be committed in a secret manner, then the two years are allowed for the return or apprehension of the offender, or the discovery of the offence: And the second, that when a prosecution shall be commenced in due time, and judgment shall be arrested or a *nolle prosequi* be entered, the two years shall be computed from the termination of the first prosecution.

It is to be remarked, in the first place, that, as seventeen years elapsed between the offence committed and the bill found, the prosecution is barred unless the special verdict finds the facts, which, according to the provisos, remove or suspend the bar arising from the time. Here, that is not done; for the verdict sets forth divers matters of evidence, from which it was argued and inferred that the marriage was secret, and that the defendant absconded or concealed himself, instead of finding directly, as it should have done, the secrecy, absconding, or concealment. It is common learning, that a verdict is defective, which finds only the evidence; since the court cannot draw inferences of fact, but only apply the law to facts agreed or found. To authorize judgment for the State, therefore, on the verdict, it ought to have contained direct findings of the necessary facts.

But the case, as we think, is for the defendant, not merely upon the ground of the defects above spoken of, in the frame of the special verdict, but also because, in truth, the evidence spread out in the verdict would not, in point of law, authorize the finding of either of the necessary facts of secrecy, absconding or concealment. Probably the principle of construction, which was applied to the severe statute of 21 Jac., 1, (making it evidence of murder in the mother of a bastard to conceal its death by secret burying,) whereby the case was taken out of the enactment, if the mother called for help, or confessed herself with child to even one person, ought not to be adopted, in interpreting the terms "secret" and "conceal" in this

act. But we hold very clearly that this marriage cannot be deemed secret—celebrated as it was, with the knowledge of the *feme's* mother and in the presence of her uncle and other near kinsfolks and other persons to the number of seven at least, and by a minister of the gospel, with license regularly granted, and, of course, appearing of record. There is a case in point. It is *Hicks* v. *Gore*, 3 Mod., 84, founded on the statute of 4 and 5 Ph. & M., ch. 8, to prevent children from being seduced from their parents and married in a secret way; and it was held that a marriage, openly solemnized in church in canonical hours, in the presence of many persons, was not within the act. This case is cited with approbation by Mr. East., 1 Cr. L., 457. This marriage was not only solemnized openly, but was immediately declared to the friends of the wife and the public generally, and was not only notorious from such declarations, but the parties cohabited and were generally known as man and wife. There is, moreover, not a circumstance of concealment by the offender, more than there is of secrecy in the offense. He always appeared openly in society, and, as a preacher in a numerous denomination, often exhibited himself, in company with his wife, to large assemblages of the members of his church and others. It is true he left the county of Person on the day of his marriage, but not as a fugitive, or to the intent to escape public observation or evade the process of the law. On the contrary, he left Person to return to the settled place of residence both of himself and his wife; and, besides, habitually met citizens of that county at his church, and during two years frequently passed through the county, preached in it, and visited and sojourned there.

It was, however, said at the bar, that the policy of the act of 1820 forbids a limitation on a prosecution for the marriage, as the consequence will generally be, that all the benefits intended for the seduced wife and her issue

will be lost. It may, indeed, often happen that the husband will acquire all the rights in his wife's property, which he would have had, if he had not violated the law; since the act is so framed, that the Court has been obliged to hold in *Shutt* v. *Carloss*, 1 Ire. Eq., 233, that he forfeits his right of property, not by the offence, but by the conviction. But that cannot prevent the application of the limitation to this, as to all other "trespasses and misdemeanors." Those terms are general, and they embrace all offences except felonies and the misdemeanors expressly enumerated in the act, namely, perjury, forgery, malicious mischief, and deceit, and such others as may by particular statutes have special limitations of their own. As far as the civil rights of the husband and wife are concerned, it will be easy for the legislature to provide, if it should be thought meet, by preventing any of her property vesting in him. But it is impossible, for the sake of advancing the pecuniary interest of the wife, to hold that her husband may be prosecuted at any distance of time, in the teeth of a statute, which imposes a limitation of two years upon prosecutions for all offences below felony, except the four aggravated misdemeanors enumerated in the act.

It is unnecessary to say anything upon the exceptions to the admission of the evidence, since, if it were wrong, the judgment could not be reversed, inasmuch as the State cannot have a *venire de novo*, except for a mistrial, technically speaking, nor have an appeal, except where the court below improperly refuses to give a judgment for the State upon a general or special verdict.

It is, perhaps, proper that some notice should be taken of the introduction of averments into the indictment, with the view of taking the case out of the statute of limitations, by bringing it within the proviso. We think it

unnecessary and inconvenient. The act does not require a change in the frame of the indictments; and this is the first instance, in which such averments have come under our observation. As the accused, according to the general rule, may avail himself of the statute on not guilty, and without a special plea, it follows that his defense may in like manner be repelled on the part of the State. It is not like a provision in a statute, which enters into the description of an offence, and must, therefore, appear in the indictment. But it is matter of defense arising out of an independent enactment, on which the defendant may insist, upon evidence; and that opens the matter to the State without any express averment. It is true, the indictment lays the offence more than two years before this bill found. But that cannot alter the rule, because it cannot be told, but that the defendant absconded or concealed himself, or that another prosecution was brought in due time so as to authorize a second bill under the second proviso; and, as the defendant could insist on the time in defense, it is to be presumed, after a conviction by general verdict, that the case was brought within the proviso. This, indeed, does not affect the present case; in which, for the other reasons already stated, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ALEXANDER TROY v. JOHN C. WOOTEN.

The legislature has the constitutional power to consolidate offices, by uniting the duties of one or more offices in one person, where the duties are not incongruous, as, for instance, the offices of clerk and clerk and master in equity. It is just, however, that the operation of such a law should be postponedf until a vacancy occurs in the office whose duties are proposed to be transferred.

Appeal from the Superior Court of Law of BLADEN County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

By a private act passed in 1826, ch. 104, it was enacted, that when the office of clerk and master in Bladen should thereafter become vacant by resignation or otherwise, it should be united to the office of clerk of the superior court of law; and that, upon such vacancy, the judge of the superior court should take from the clerk the official bonds and administer to him the oaths required of clerks and masters; and that, thereupon, the clerk should perform the duties, receive the fees for services, and be subject in all respects to the laws regulating clerks and masters in equity.

In 1845, William J. Cavon was elected the clerk of the superior court of Bladen, and was admitted into office, and gave the requisite bonds under the same, and performed the duties of clerk and master, the same having before become vacant; and in 1847 he resigned, and Alexander Troy was duly appointed by the judge of the superior court the clerk thereof, and by virtue of that appointment, after giving the requisite bonds and taking

the oaths of office, he was admitted into office, and discharged the duties of clerk and clerk and master until the last October term of the court, In August, 1849, John C. Wooten was elected the clerk of the superior court of Law, and at the ensuing October term, he gave the requisite bond and took the oaths of office and was admitted therein; and at the same time he gave the bonds and took the oaths prescribed by the act of 1826, and upon his application the court made an order on Troy to deliver the records of the court of equity to Wooten. Troy opposed the making of that order upon the grounds, that the office of clerk of the superior court was distinct from that of clerk and master, and that by the constitution they could not be united in the same person; and that, by virtue of his own appointment in 1847, he was entitled to the office of clerk and master for four years from that period; and he appealed to this Court.

*D Reid*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. If there were anything in the constitutional objection, it would not be competent to Troy to urge it, as he was not appointed to the office of clerk and master for four years or for any period, as an independent office, but came into the office of clerk of the superior court for the unexpired term of the clerk who resigned, and, as such, he performed the duties of clerk and master also. He, therefore, was out of office, at all events, and had no such interest in the question as would entitle him, as a private person, to oppose the admission of Wooten, or appeal from the order. If Wooten were improperly admitted, it is the right of the public to question his title, and that right can only be asserted by the proper officers, and not by individuals.

But the Court is of opinion, that the act of 1826 is constitutional. The only provision in that instrument, which has any bearing on the question, is that in the 35th section, that no person shall hold more than one lucrative office at any one time. But that does not restrain the legislature from abolishing an office and transferring its duties, so as to attach them to another office, when it shall seem to the general assembly to promote the public weal, and when the several duties are not in their nature incompatible. A statute, for example, could not unite the duties of judge and attorney general in the same person or office. But there is nothing incongruous in thus connecting the functions of a judge of the courts of common law and of the chancellor; and in fact that has been done up to this period, beginning co temporaneously with the organization of the government under the constitution, after the establishment of independence. So, the clerk of this Court has always, by virtue of that office, acted as both clerk and clerk and master on the law and equity side of the Court. No one has ever thought, that either of those instances was an infraction of the constitution. The purpose of that provision was to insure the due performance of the duties of every office by preventing any person concentrating in himself two or more offices, whereby he would be unable to give the necessary attention to all; which there might be some danger of being effected by the influence one office might create. It was not supposed, the legislature would unnecessarily multiply offices, so that any one would not furnish employment nor yield a competent livelihood to the incumbent. Therefore, when the legislature should create distinct offices and assign them appropriate duties, the meaning was, that the appointing power, in whomsoever vested, should not bestow more than one of them on the same person, or, at least, that the same person should not hold them at the same time. But,

as the functions of a clerk and clerk and master are homogeneous, and in the beginning those functions might have been all attached to the same office, the power must likewise reside in the legislature, when deemed fit, after creating the offices, to unite them again, so as to make but one out of both, or, rather, to abolish one and assign its duties and emoluments to the other. The policy of such an act may obviously be beneficial. In many small counties the business and emoluments of clerkships of each kind, when separated, are so small, that competent men cannot be prevailed on to accept the offices, essential though they be to the convenience of suitors and the due administration of justice. It therefore answers an important purpose in the public economy, by uniting the duties and fees in one office, to induce fit men to take the place. There can be no doubt, for instance, that instead of registering deeds in a separate office, the legislature might, as is done in some states, require them to be enrolled in the court in which they are proved; and with that view, it would be competent to abolish the office of registrar and require the clerk of the county court, as such, to perform the duties. For, while it is not to be presumed, on the one hand, that the legislature will create needless offices, so, on the other, it cannot be presumed that it will, with the intent to evade a constitutional provision, impose on one officer more duties than by reasonable diligence he can discharge.

The act under consideration is of the kind just spoken of. It unites the office of clerk and master to that of clerk of the superior court—justly waiting, however, until there should be no clerk and master before carrying the enactment into execution. It is said, indeed, there are terms in the act, which preserve the separate existence of the office of clerk and master. But it seems to the Court otherwise. Taking from the clerk a bond to perform the duties of clerk and master has no effect on

the question ; for every clerk gives several bonds to cover duties of different kinds. Indeed, if the language of the act had left it doubtful, whether the legislature had the particular intent to abolish the office of clerk and master or not, it would be the duty of the court to hold the former ; for the reason, that, as a principle of construction, it must be assumed that the legislature did not mean to violate the constitution, and the statute must be interpreted so so as to make it consistent with the constitution, if possible, and then obeyed so far as it is consistent therewith. Consequently the Court hold that the orders of the superior court were right, and affirm them.

PER CURIAM. Orders below affirmed.

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BENJAMIN F. KEATON v. WILLIAM F. BANKS, et al.

A judgment may be vacated at any time, on motion in the same court in which it was rendered, upon parol proof that it was entered irregularly and not according to the course of the court; as, for instance, where the defendant in the cause was an infant, and no guardian had been appointed to represent his interest.

The cases of *White* v. *Albertson*, 3 Dev., 242; *Bender* v. *Askew*, 3 Dev., 152; *Pearson* v. *Nesbitt*, 1 Dev., 315, and *Crumpler* v. *Conner*, 1 Dev., 53, cited and approved.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

This is a motion to vacate a judgment. The case is as follows: A writ was issued on the 2nd day of March, 1841, at the instance of Banks against Benjamin F. Keaton, who

was an infant, returnable to the March term, 1841, of the county court of Pasquotank. This writ was filed, endorsed, "service accepted William F. Keaton." At the same term the cause was referred to the clerk who at September term, 1841, made a report, after which, upon the record was found the following entry: "Jury empanelled and find that the defendant did assume," &c. Judgment was rendered, and on an execution issued thereon negroes belonging to the plaintiff were sold. The sale took place in the spring of 1843. In August, 1849, a notice was issued to the defendant by the plaintiff, that, at the ensuing term of the county court of Pasquotank, a motion would be made to vacate the judgment so obtained, and at the succeeding term in September, all parties being in court, "it was adjudged by the court, that the said judgment be set aside and declared void." From this judgment, Banks appealed to the superior court. In the superior court, the plaintiff offered evidence to show, that, by the judgment originally given against him in the county court, while he was an infant, he was greatly injured, by reason of the want of a proper defense to the action. He further offered to show by William F. Keaton, that he never was appointed guardian *ad litem* to Benjamin F. Keaton to his knowledge, nor ever consented to be appointed, and that he did not defend the said action. This parol evidence the court refused to hear and reversed the order of the county court.

From this judgment the plaintiff appealed.

*Heath*, for the plaintiff.
*Ehringhaus*, for the defendants.

NASH, J. We do not concur in the opinion of the court below. The error seems to have originated in not advert-

ing to the difference between receiving parol testimony to impeach a judgment collaterally, and to receiving it on a motion, to vacate it, made in the court where the judgment is. In the former case it is certainly incompetent, in the latter it is competent. Upon the appeal from the judgment of the county to the superior court, the trial was to be had in the latter, as it was had in the former. And, if the evidence offered to his Honor was such, as would have been proper in the county court, it ought to have been admitted by him. In the writ William F. Keaton is called the guardian *ad litem* of Benjamin, and the record is upon its face regular according to the course of the court. The service of the writ appeared to have been admitted by William F. Keaton; the court must have then considered the infant Benjamin in court. The fact was otherwise. According to the evidence offered, William F. Keaton never was appointed the guardian of the infant, and never consented to be so, and did not defend the action. If this was so, the judgment was in *reality* irregular, and contrary to the course of the court. If an action had been brought to recover the property sold under it, however, evidence could not have been received to impeach it. It was the judgment of a court having jurisdiction of the matter. But according to the fact, Benjamin F. Keaton was no party to the proceedings either by himself or his guardian. And the judgment is void, for there can be no judgment against a person not in court. *White* v. *Albertson*, 2 Dev., 242. The question then presents itself, could the county court set aside this judgment at a term subsequent to that at which it was rendered, by petition or motion, and receive parol evidence to show the truth of the transaction. It appertains to every court, as a necessary part of its functions, to set aside an irregular judgment. The ends of justice often require it. *Bender* v. *Askew*, 3 Dev., 152. In that case it is stated by the Court, that the power so

to do is not confined to the term in which the judgment is rendered. The judgment against Bender was rendered at January term, 1838, and set aside at August term 1839. The first case presenting the question is that of *Pearson* v. *Nesbit*, 1st Dev., 135. There the judgment was obtained at fall term, 1820, and the motion, on affidavit, not filed until fall term, 1827, when the judgment was vacated, because *Jesse A. Pearson* was both plaintiff and defendant. In *Crumpler* v. *Governor*, 1st Dev., 52, a final judgment, obtained at one term of the court, was at a subsequent one, on *motion* founded on affidavit, set aside for irregularity. In all these cases the motion was made in the court, where the judgment was, and directly upon it. Tidd's. Prac., 614; Bing. on Judgments, 21, 22. It has been insisted, however, that the original case continued in court two terms, before the judgment was entered against Benjamin Keaton, and the court thereby recognized William F. Keaton as his guardian, and Benjamin was in court. For this position the case of *White* v. *Albertson*, 3 Dev., 242, was cited. The attempt there was to impeach the judgment collaterally. Judge HENDERSON put it upon that ground exclusively. It is true that the case was in court the time specified, and the record does speak of William F. Keaton as the guardian of Benjamin. But on motion to vacate the judgment, as irregular, the court is not precluded from inquiring into the truth, whether William F. Keaton was the guardian of Benjamin, and whether the latter did appear or not. *Bender* v. *Askew*, 3 Dev., 152. The vacating such judgments proceeds upon the grounds, "that a judgment has been signed upon the record, which was not in fact the judgment of the court, which the court ought not to have given, and which the plaintiff or his attorney knew the court would not give or allow."

The judgment of the superior court is reversed and the case remanded.

PER CURIAM. Ordered accordingly.

JOHN D. GORDON v. GEORGE PRICE.

In an action upon a bill of exchange, the evidence of a witness, who cannot swear to the handwriting of either party of the firm, in whose name the bill was drawn, but who testifies, that, in his opinion, the handwriting was the same as that of many notes, he had presented to the firm and which had been paid by them, was competent, and it was proper to leave such evidence to the jury, to be judged of by them.

By the law merchant, a protest of a bill by a public notary is, in itself, evidence. And by our statute, Rev. Stat., ch. 13, sec. 10, such protest is *prima facie* evidence.

Where a bill has been drawn by A. upon B., in favor of C., and is protested for non-payment, the acceptance by C. of another bill from B., unless it is expressly understood that this is to be a satisfaction of the debt due by A., does not debar C. of his action against A. upon the original bill, provided the bill of B. is dishonored. But it is necessary for C., in his suit upon the original bill, to shew that he used proper diligence on the second bill and could not obtain payment.

The cases of *Pope* v. *Askew*, 1 Ire., 16, and *State* v. *Harris*, 5 Ire., 287, cited and approved.

Appeal from the Superior Court of Law of CHOWAN County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

The action is assumpsit by the payeee of a bill of exchange for $500, purporting to be drawn at Edenton in this state by George Price & Co., on Thomas McAdam & Co., of New York, on the 11th of November, 1844, and payable at sight, and it was tried on non-assumpsit, and satisfaction pleaded.

The firm of George Price & Co. was composed of George Price, the defendant, and one Daniel Messmore, and, at and before the drawing of the bill, did business in Edenton. To establish the drawing of the bill, a witness

for the plaintiff deposed, that he knew the handwriting of the defendant, and that the signature to the bill was not written by him; that he had never seen the other partner, Messmore, write, and he could not say, whether he signed the bill or not; but that he was a constable in Edenton, while George Price & Co. did business there, and had frequently received for collection notes in their name, which he presented at their place of business, and that they were paid by the firm; and that the bill sued on and those notes were in the same handwriting. This evidence was objected to on the part of the defendant, but was received.

The plaintiff further offered in evidence a protest of the bill, made on the 16th of November, 1844, for non-payment, purporting to be under the signature and seal of a notary in New York. On the part of the defendant, it was insisted, that it could not be received without proof of the handwriting and official character of the person professing to be a notary. But the court allowed it to be read to the jury.

On the part of the defendant evidence was then given, that the plaintiff lived in Norfolk in Virginia and cashed the bill there at the request of one McAdam of that place, who carried it to him for that purpose; and that, upon the return of the bill protested and information thereof to McAdam, he offered the plaintiff a bill drawn by "McAdam & Brother," of Norfolk, on "Thomas McAdam & Co.," of New York, and payable to one Gray, for the amount then due on the bill sued on, and endorsed by Gray to the plaintiff, and that the plaintiff received the same. Thereupon the plaintiff gave evidence, that the bill last mentioned was not paid at maturity, but protested for non-payment; and that, upon the return of it, the plaintiff recovered judgment thereon against Gray, but was unable to obtain satisfaction thereof. Upon that evidence the counsel for the defendant prayed an instruc-

tion to the jury, that the second bill, so received by the plaintiff, was a satisfaction of that sued on in this action, and that the drawers were hereby discharged. But the court refused to give the instruction, and directed the jury, that accepting the second bill would not amount to a payment or satisfaction of the bill sued on, unless it was given and received, upon an agreement that it should be a satisfaction.

After a verdict and judgment for the plaintiff the defendant appealed.

*Burgwin* and *A. Moore*, for the plaintiff.
*Heath*, for the defendant.

RUFFIN, C. J. Upon the point, as to the proof of the handwriting, the case seems to be one of that class, in which the proof has been allowed to come from a witness, whose knowledge of the writing was derived from papers purporting to be made by the party, which were established in the mind of the witness to be genuine, by the fact, they were so treated by the party from time to time by paying them. *Pope* v. *Askew*, 1 Ire., 16, and *State* v. *Harris*, 5 Ire., 287. It is of no consequence, that the witness had no such knowledge of the writing of the partner, Messmore, derived in any manner, as would enable him to say with precision, that he believed that Messmore personally put the name of the firm to the bill; for, whether that person, or any other duly authorized, signed the bill, the firm was in law the drawer, and the witness states his belief, that, as far as could be judged from the handwriting, this bill was signed by the same person who habitually made notes on the house of George Price & Co., which that firm habitually took up from the witness. The substance of the testimony is, that whoever generally gave securities in the name of George Price & Co.—whether one of the partners or a clerk—must have

drawn the bill in question. That we think was sufficient to let the bill go to the jury, whose province it was to determine, how much credit ought to be allowed to the judgment and integrity of the witness.

By the law merchant a notarial protest is, in itself, evidence. Chitty on Bills, 405. The doctrine rests upon usage and the universal convenience of the commercial world. With us, however, it is established by statute, which extends to all kinds of bills, and makes the protest *prima facie* evidence, against the drawers, of a demand on the drawee and notice to the drawer. Rev. Stat., ch. 13, sec. 10.

The Court concurs also in the instructions to the jury. The note or bill of a third person taken by a creditor, may, under circumstances, be a satisfaction absolutely; that is, when so intended. If it be passed at the time of making a purchase or otherwise contracting a debt, there seems to be a natural presumption of an intention, that it should be in discharge of the debt; and that appears to be the general effect of the adjudged cases. But, at the same time, the current of the authorities, in the case of a pre-existing debt, is the other way; establishing that the discharge of such a debt is not presumed from the creditor's accepting a note or bill on another merely, but there must be an agreement to that effect, either express or to be inferred plainly from the circumstances and conduct of the parties. It is not necessary to refer to particular adjudications, as they are numerous, and the doctrine established. Most of the cases are collected in the note of the American decisions appended to *Cumber* v. *Wane*, in the American edition of 1 Smith's Leading Cases, 146. There is nothing here to authorize an inference of an unconditional agreement for the extinguishment of the prior debt by the second bill. The contrary presumption is strong, from the circumstance, that, when the plaintiff took the second, he still kept the first bill; as it shows he

did not mean to give up any name until he should get actual satisfaction. It was, indeed, incumbent on the plaintiff to show on the trial of this suit that he used proper diligence on the second bill and could not obtain payment. But that he did. It was, however, argued that the rule applies only when the creditor receives a second bill or note from some one, who was liable for the original debt, which was said not to be the case here, as McAdam, from whom the plaintiff received the bills, was not a party to either. That person is not stated not to be one of those bearing that name, who composed the firms in Norfolk and New York; and from the transaction one would take it, that he was of those firms and in that way connected with the bills, and probably also as agent for George Price & Co., for whose accommodation it would seem the bill might have been drawn, and discounted, as it was made payable to the plaintiff, not upon any previous transaction, but to be discounted simply. But, if McAdam was really a mere stranger and only the agent of George Price & Co. to procure the discount, the case is stronger against the defendant: for then the drawers cannot avail themselves of his act, being that of a stranger, as a satisfaction of their debt. *Clow* v. *Borst & Best*, 6 John. Rep., 37.

The counsel for the defendant further insists, that the protest was premature, inasmuch as the bill was entitled to grace, and yet it does not appear that it had been presented before the 16th of November—the day of the protest for non-payment. But this point is not taken in the exception, and therefore cannot be taken here. It cannot be told, that the plaintiff did not show by other evidence a previous presentment of the bill; or that in New York sight bills are not entitled to days of grace, as, according to our impression, such is the rule here.

PER CURIAM. Judgment affirmed.

JOHN BRITT v. JOHN PATTERSON.

An appeal will lie to the superior court from an order of the county court, allowing an amendment; and in such a case the superior court has the same right of discretion, in regard to the amendment, which the county court had —the order of the county court being annulled by the appeal.

Appeal from the Superior Court of Law of GREENE County, at the Fall Term, 1849, his Honor, Judge *Manly*, presiding.

The plaintiff took out an attachment against the defendant's estate for $450, directed to any constable, and returnable before a justice of the peace, and it was levied and returned to the next county court. At that term the plaintiff moved the court to amend the proceedings by directing the writ to the sheriff, and making it returnable to that term of the court, and allowing the return on it to be changed from that of a constable to one by the sheriff. The motion was opposed by Patterson; and he, on his part, moved the court to quash the return and the writ. The court refused the motion of Patterson, and allowed that of Britt; and the former prayed and was allowed an appeal, but was unable at the time to give the security required by the court. Afterwards he took the case up to the superior court by *certiorari*, and there both parties renewed respectively the motions they had made in the county court, and his Honor reversed the decisions, and held that the motion of the plaintiff, Britt, ought to be disallowed, and that of Patterson allowed and ordered accordingly; and then Britt appealed to this Court. On the part of Britt his own affidavit was offered to establish the justice of the debt, and that of the jus-

tice, who issued the attachment, stating that the proceedings were put into the form, in which they were, through his ignorance and mistake of the law.

*J. H. Bryan* and *Husted*, for the plaintiff.

*Biggs*, for the defendant.

RUFFIN, C. J. It is insisted on the part of Britt, that the decision of the county court is conclusive, as it belongs to each court to make amendments, as a matter of discretion, not the subject of revision. That is true in respect of appeals to this Court from such orders in the superior court; but it never has been so held as between the county and superior court. The distinction is this: that, as a court of error, which is the character of this Court, it is not competent to it to exercise any discretion, which is necessarily more or less dependent upon evidence and facts, but only to determine whether, in point of law, a decision of the court below be erroneous or not; whereas, upon appeal from the county to the superior court from an order of amendment, the latter court has all the discretion the former had, and can receive new evidence, and determine upon the propriety of the amendment, according to the case as made to appear to the superior court. It was therefore proper that his Honor should consider of the several motions of the parties. Indeed, it is seen, by what was done in this case, that the decision of the county court was annulled by the appeal from it, and then Britt was under a necessity to renew his motion in the superior court. It follows, of course, that the court was obliged to consider of its propriety, and might therefore refuse it. Having done so, the decision must stand, even if we, here, thought it an indiscreet exercise of power; as it has often been decided, that the Supreme Court cannot interpose in such cases. We must say, however, that, as far as an opinion can be

formed from the face of the record and the facts disclosed in the affidavits, our judgment would entirely concur with that of his Honor, if it were our province to decide the point. The course of the creditor was a gross abuse of the process of attachment, in the first instance; and the attempt to sustain it in this manner was an equally gross abuse of the power of amendment, exercising it, not to advance justice by a fair trial, but to encourage short cuts to stifle defense.

PER CURIAM. Orders affirmed.

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MARTHA A. LASSITER v. CHARLES H. HARPER.

Where a judgment was obtained before a justice of the peace against a husband and wife, on a bond executed by them during their coverture, and an execution levied on the land of the wife, and returned to the county court, where, after the death of the husband, an order was made for the sale of the land; *Held*, that the wife was entitled to a *certiorari* to the superior court.

The case of *Dougan* v. *Arnold*, 4 Dev., 99, cited and approved.

Appeal from the Superior Court of Law of GREENE County, at the Spring Term, 1849, his Honor, Judge *Battle*, presiding.

This is an appeal from an order dismissing a writ of *certiorari*. The facts are these: The plaintiff, Martha A. Lassiter, was the wife of one Uzzell Lassiter, and, during their coverture, they executed their joint bond to Harper for $94.50, on which a warrant was brought and judgment rendered against both in March, 1847.

Afterwards the husband died and Harper sued out execution against the husband and wife, which the constable levied on the land of Mrs. Lassiter and returned the levy to the county court, on the 2d Monday of August, 1847, when, without taking any notice of the husband's death, the justice's judgment was affirmed, and a *venditioni exponas* was awarded, and, in October following, the plaintiff obtained this writ. Her affidavit stated her coverture, at the time the bond was given and the judgment rendered, and that it was rendered in her absence and without her knowledge. The counter-affidavits of the creditors and the constable were put in, and stated that Uzzell Lassiter was insolvent, and that the debt was contracted for necessaries for his family, and that the articles were sold on the credit of the *feme* and her land; and that she made no objection to the judgment being given, on account of her coverture, nor prayed an appeal, but she acknowledged the justice of the debt, and promised, at the time and also after the death of her husband, to pay or secure it by a new bond; and that she so continued to promse, until she was advised by counsel at August court, that she might avoid the payment by reason of her coverture, when she refused to give her bond; but that she did not, even then, oppose the affirmance of the judgment and order of sale. In reply the plaintiff offered the affidavit of the magistrate, that Mrs. Lassiter was not present when the judgment was given, though it purports to have been rendered by confession; and her own affidavit, that the debt was chiefly for spirtuous liquors sold to her husband, who was very intemperate.

His Honor was of opinion, that the case was a proper one for a writ of error *coram nobis*, and not for a *certiorari*; and he dismissed the latter writ.

No counsel for the plaintiff.

*Biggs*, for the defendant.

RUFFIN, C. J. There is no doubt, that coverture in a defendant, at the time of the suit commenced, is error of fact, and it may ordinarily be corrected by writ of error *coram nobis.* Tidd's Pr., 1137. Perhaps that remedy might be used in this case. We will not say, it could not. But, owing to the peculiar nature of the proceedings, the question does not seem free of difficulty. For, while the writ would necessarily go to the county court, it is obvious, that there was no error there, but that it was in the proceedings before the justice out of court. From him the case went to the county court upon execution, and, of course, not open to defense. The court might probably hear and decide in a summary way an allegation of payment since the judgment rendered, or that there was personal property, or the like. But certainly no defense could be made there, which the party might have made before the justice, and therefore this disability could not have availed her in the county court, and there was no error in affirming the judgment. But it may be admitted, that a writ of error would lie in such a case. Yet we think the *feme* is entitled to the remedy by *certiorari* also, and, indeed, that is the more convenient method of proceeding, and the better, because it opens the case to a final determination on the merits. She is entitled to the *certiorari*, as an extension of the privilege of making defense and appealing, of which she was deprived by the creditor's suing her and taking judgment, when she was under the incapacity of coverture, and could neither plead nor appeal. As our law intends that every person may have a trial *de novo* of the facts, unless the party gives up an appeal by his own *laches*, it is clear the *feme* is in this case entitled, as if she had been *sui juris* and had appealed. The objection, that no defense was made upon the trial of the warrant is nothing, as she could not defend. Besides, judgments by default are set aside upon *certiorari*, and the defendant allowed

to plead upon showing merits and that the omission to appeal did not arise from *laches*. *Dougan* v. *Arnold*, 4 Dev., 99. And there can be no clearer merits, than those of a woman, who has been prevailed on to execute a bond during coverture, whereby it is void. There is an attempt to answer that by bringing forward promises to pay the debt after the death of her husband. But they cannot have any effect; for they could not add any efficacy to the judgment, as one against her, and, as engagements to pay the debt of the husband, they were without consideration, and also void, because they were not in writing. The Court holds, therefore, that the order dismissing the *certiorari* is erroneous, and that the party ought to be allowed to plead to the merits, and have a trial in the superior court.

PER CURIAM. Judgment accordingly.

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THE STATE v. COONROD CREASMAN.

Where, on a capital trial, the prisoner challenges a juror for favor, and the solicitor for the State admits the cause to be true, the prisoner is bound by his challenge and cannot afterwards be allowed to have the matter tried either by the triers or the court.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

The prisoner was indicted for rape. In forming the jury, a person tendered was challenged by him for favor,

and the counsel for the State admitted the cause assigned to be true, and the court thereupon allowed it. On the part of the prisoner, it was then insisted, that the admission, that the juror was not indifferent for the prisoner, did not of itself authorize his discharge; and that the prisoner had a right to examine him on oath touching that matter, and, if it should thereby appear that he was indifferent, then that the prisoner had a right to elect him of his jury. But the court refused to consider the matter further.

The woman alleged to have been violated, was examined on the trial, and, after proving the fact, she stated, as a part of her testimony, that she made no outcry at the time, and gave no information of the injury to any person for four or five months after it occurred—assigning, as the reason for her conduct in those respects, that the prisoner threatened to kill her, if she did not submit or if she should ever tell any one. Evidence was further given to support and discredit the testimony and character of the witness. The counsel for the prisoner moved the court thereupon to instruct the jury, that the great length of time, before the prosecutrix made known the alleged violence, created such a presumption against the truth of her testimony, that the jury ought not to rely on it, but ought to acquit the prisoner. The court refused to give that instruction, but informed the jury, that the admission of the witness, that she made no outcry, and that she concealed the alleged wrong so long, was a circumstance which tended to her discredit and ought to be considered by the jury accordingly; and that it was for them to determine from those circumstances, and from the reason she gave for her conduct, together with the evidence of her character, and the other evidence affecting her credibility, how far she was entitled to belief. And the court further instructed the jury, that, after considering all the evidence, if they should be of opinion

beyond a reasonable doubt, that the prisoner had carnal knowledge of the prosecutrix, forcibly and against her will, they ought to find him guilty; but if they should be of opinion that he did not have carnal knowledge of her, or, if he had, that it was not against her will, they ought to find him not guilty.

The indictment lays the day of the offence to be the 9th of April, 1849; and in the caption of the record, it appears that the term of the court at which the bill was found, began, and was held the 2d Monday after the 4th Monday in March, 1849, which was the 9th day of April. It further appears on the record that the witnesses were sworn and the bill was sent to the grand jury on the 10th of April, 1849. The prisoner was convicted and appealed.

*Attorney General*, for the State.

*W. H. Haywood*, for the defendant.

RUFFIN, C. J. The challenge of the juror was properly allowed. A party has no right to examine the juror or any other person by way of fishing for some ground of exception. A challenge must be made and a specific cause assigned, and that cause denied on the other side, before evidence can be heard; for, until that be done, there is no issue for the decision of the triers or of the court in their stead. When one party, in order to save time, or from a conviction of its truth, confesses the other's cause of challenge, it must necessarily be held to be true; and the one cannot complain of the allowance of his own exception, nor the other of the reception of its admission.

The effect to be given to the testimony of the woman depended upon the credit to which she was entitled; and that was a question exclusively for the jury, and it was fairly left to them.

It has been suggested that the indictment may be defective in not averring the offence to have been committed

at some hour of the day before the inquisition taken, since the day stated in the bill, and that on which the court began is the same. If there were anything in the objection, it would not apply here; as the record shews affirmatively that the bill was sent to the grand jury on the second day of the term, and so it must have been found after the offence charged.

The Court do not see any other ground on which the judgment can be reversed, and it must stand affirmed.

Per Curiam. Ordered to be certified accordingly.

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JOHN McRAE, for himself and the Wardens of the Poor v. JOHN KELLER.

Under our statute, prohibiting the sale of liquor to a slave, which gives a penalty of one hundred dollars against the offender, and declares, that it shall "be recovered by warrant, before any justice of the peace, and applied, one-half to the use of the party suing for the same, and the other half to the use of the poor of the county," any person may sue for the penalty as informer, *qui tam*.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1849, his Honor, Judge *Caldwell*, presiding.

This is an action of debt, to recover a penalty given by statute for trading with a slave; commenced before a justice of the peace, and brought to this Court by successive appeals. Plea, not guilty. And it was submitted to this Court upon the following case agreed: "That the defendant, John Keller, on Sunday, the 28th

day of March, 1847, did sell and deliver to Larcel, a slave, the property of B. Flanner, in the county of New Hanover, spirituous liquors, without the permission in writing or otherwise, from his master or manager, so to do."

The defendant contends that the plaintiff cannot recover; because the statute, which gives the penalty, sought to be recovered in this action, does not confer upon the plaintiff the right to sue.

The court, being of opinion with the plaintiff, rendered judgment accordingly, and on motion judgment against sureties to the appeal, from the judgment of the county court, whereupon the defendant appealed to the Supreme Court.

No counsel for the plaintiff.
*D. Reid*, for the defendant.

Ruffin, C. J. The writ was commenced by warrant to recover the penalty of $100, given by the Revised Statute, ch. 34, sec. 75, for selling spirituous liquors to a slave. It was submitted to the court upon a case agreed, in which the facts charged were admitted, and the only objection taken to the recovery was, that the act does not give the informer an action. His Honor held that it did; and from a judgment against him the defendant appealed.

The opinion of the Court is, that the judgment was right. The act gives the penalty, "to be recovered by warrant before any justice of the peace, and applied, one-half to the use of the wardens of the poor of the county." The single question is, in whose name the suit is to be brought; and it seems difficult to imagine a clearer direction than that it is to be in the name of any person who will bring the suit—"the party suing for the same." It is true, that an informer has no right, at common law,

to an action for a penalty; and therefore he cannot bring an action unless the statute give it to him. It is so laid down in *Fleming*, *qui tam* v. *Bailey*, 5 East., 313; which was cited for the defendant not only for that position, but also for the further one, that such words as are in our statute are not sufficient to give the informer an action. But it is plainly not an authority to the latter point. The statute there sued on gave various penalties of different amounts, and enacted that any of them "exceeding £20 shall and may be recovered before a justice of the peace." By a subsequent clause it was further enacted, that all the penalties, when recovered either by action in any court or in a summary way before a justice "shall be applied, one moiety to the plaintiff in any such action, or the informer before any justice, and the other moiety to the king." It was held, that an informer could not sue *qui tam* for any penalties of £20 or under; because, although the act applied one moiety of them, "when recovered," to the informer, yet it conferred on him no right to sue for those penalties, as it did in respect of those exceeding £20. That, as it seems to us, was clearly right; since, when a statute prohibits a thing, as an offence to the public, under a penalty, no debt arises to a private person, unless the statute also gives the penalty or a part of it to him, who will sue for it, as laid down, long before the case cited, by Sergeant Hawkins. Pl. C., Bk. 2, ch. 25, sec. 17. The reason is, that the penalty for such public offence belongs to the sovereign as a debt, and is to be recovered by action in the name of the sovereign. *Rex* v. *Malland*, Str. 828. The case of *Fleming* v. *Bailey* is, then, an authority to this only, that applying a part of the penalty, after its recovery, to the benefit of an informer does not confer on him the power of suing for the penalty. In other words, that the term "informer" in the statute does not *per se* imply, that in such a case he may be "the plaintiff" in an action for the recovery,

but only the informer or prosecutor, as he is sometimes called. But the provision in this statute is not of that kind. It creates a penalty, "to be recovered by warrant, and applied one-half to the use of the party suing for the same, and the other half to the wardens of the poor." This recognizes the right of action in some person. In whom? Why, "the person suing," as plainly as it can be. Sergeant Hawkins, in the section already quoted, states, that when a statute gives a part of a penalty "to him who will sue for it," he took it to be settled, that any one may bring an action and lay it *tam pro domino rege quam pro seipso;* thus using the very terms in which the act under consideration is expressed. There are, indeed, many acts, in which the like language is found, on which informers have sued in their own names. Both the English statute and our own against usury, for example, have the words, "the one moiety of which forfeitures to be to him that will sue for the same by action of debt, and the other," &c.; and we know that in both countries the action of debt in such cases is constantly brought in the name of the informer *qui tam.* Those words, "to him, that will sue for the same" and "to the use of the party suing for the same," not only determine the interest which the informer is to have in the penalty, but necessarily imply, if they do not expressly confer, his right of action *qui tam.*

Per Curiam. Judgment affirmed.

ELISHA HERRING v. THE WILMINGTON & RALEIGH RAILROAD COMPANY.

The position is not tenable, that whenever damage is done, the law implies negligence.

But where the plaintiff shews damage, resulting from the act of the defendant, which act, with the exertion of proper care, *does not ordinarily produce damage*, he makes out a *prima facie* case of negligence, which cannot be repelled, but by proof of care, or some extraordinary accident, which makes the care useless.

What amounts to negligence is a question of law.

In an action on the case against a railroad company for the negligence of their agent in running over and killing a slave, where it appeared that the slave was asleep on the track, that the cars were going with their usual speed and at the usual hour, and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels; *Held*, that was not a case of negligence to subject the company to damages.

The case of *Ellis* v. *Ports. & Roan. R. R. Co.*, 2 Ire., 138, cited and approved.

Appeal from Sampson Superior Court of Law, at a Special Term in December, 1849, his Honor, Judge *Battle*, presiding.

This was an action of the case, brought by the plaintiff to recover damages of the defendants for negligent management of their cars, whereby one of the plaintiff's slaves was killed and another badly wounded. On the trial it was proved, that, on a certain Sunday in the month of August, 1845, about two o'clock in the afternoon, a train of cars, belonging to the defendants, was passing along their road at the usual rate of 15 or 20 miles an hour, when the wheels of the cars passed over one of the plaintiff's slaves and killed him instantly, and badly injured the hand of another.

It was admitted, that the slaves were asleep at the time, but it was disputed, upon the evidence, whether they were lying on the bed of the road or just outside of it, or whether the one who was killed was not sitting asleep on one of the rails, no witness having seen them until after the injury, when the body of the deceased was found on the bed of the road with his thigh and arm both crushed. The day was clear, and the part of the road, where the slaves were, was straight for more than a mile, but the slaves were under the shadow of a bridge, which connected the two sides of a deep cut, sixty feet wide at top at that place. The witnesses differed as to the distance, at which the slaves might have been seen by the engineer, who had the management of the cars, had he been looking out for them, some stating it to be half a mile, and others at two hundred yards. It was proved, that the train of cars was the regular mail train, and that it was passing at the usual hour, and that the plaintiff owned the plantation at the bridge on both sides of the road. The defendants, for the purpose of showing that the injury was not occasioned by any fault of their agent, offered to introduce, as a witness, the captain of the train, but it was objected, that he was interested, because of his being responsible to the defendants, if a recovery was had against them. It appearing, however, upon his examination to that point, that he had nothing to do with the running of the cars, that being under the exclusive direction of the engineer, who was appointed by, and responsible to, the company, and not to the captain, he was admitted. From the testimony of him and other witnesses it appeared, that when the cars were very near the slaves, just before it passed over the one who was killed, the engineer attempted to stop the cars by letting off the steam and reversing the wheels, but the impetus, which they had received, carried them on about seventy yards before they stopped. It was proved to be the duty of the

engineer, whose station is on the right side of the engine, to keep a lookout for obstructions on the road. It was further proved, that, when the train was moving at the rate of 15 or 20 miles an hour, it could not be stopped suddenly in a shorter space than seventy-five or a hundred yards. The engineer was proved to be ordinarily skillful. The plaintiff contended, that it was only necessary to prove, that the injury was done to his slave by the defendants or their agent, and the law would imply that it was done negligently, until the contrary was shown. The plaintiff contended further, that he was in no default; for, that, admitting it to have been wrong in his slaves to have gone to sleep on the the defendants' road, at the time when their train of cars usually passed, he was not to be affected by their wrongful act. But that, if the fault of his slaves could be imputed to him, he was still entitled to recover, if the defendants were, as he contended they were, guilty of neglect on account of their agent, the engineer, not keeping a proper lookout, and by such default not having seen his slaves in time to prevent running over them. In other words, that notwithstanding his, the plaintiff's default, the defendants' misconduct was the *proximate* cause of the injury, and they were therefore responsible for it. The defendants contended, that, as the plaintiff was guilty of the first negligence by his slaves going to sleep on their road at such an unseasonable hour, he brought the injury on himself and could not recover, even supposing their agent was, though they contended he was not, guilty of some negligence.

The court charged the jury, that to entitle the plaintiff to recover he must show, that he had sustained an injury by the negligent conduct of the defendants' agent: that the plaintiff's slaves were guilty of neglect in going to sleep upon the defendants' road at the time and under the circumstance stated by the witnesses, and that the

fault of his slaves was imputable to the plaintiff: this circumstance, though it would not in all cases excuse neglect on the part of the defendants, yet would diminish the amount of prudence and care required of them: that, if the plaintiff's slaves had been crossing the railroad along an ordinary public highway, where they had a right to be, the defendants would be responsible for any neglect of their agent, the engineer, in keeping a proper lookout, if such neglect were the cause of injury to the slaves; but that, under the circumstances of this case, such precautions in keeping a lookout could not be expected or required from the engineer, and the defendants were not responsible, unless their engineer, after seeing the slaves, failed to use all the means in his power to prevent injuring them, and that they were responsible, if he did fail to use such means after seeing the slaves.

The jury returned a verdict for the defendants. And the plaintiff, after an ineffectual motion for a new trial, appealed to the Supreme Court.

*Strange* and *D. Reid*, for the plaintiff, relied upon the following authorities:

*Huggett* v. *Montgomery*, 5 Bos. & Pull., 446; *Williams* v. *Holland*, 10 Bing., 112, (25 E. C. L. R., 50) 1 *Petersdorf's Abridgement*, 112; *Walman* v. *Robinson*, 1 Bing., 213; *Dean* v. *Clayton*, 7 Taun., 489, (2 E. C. L. R., 183); *Peggitt* v. *Eastern Co. R. R. Co.*, 54 E. C. L. R., 229; *Lynch* v. *Nurdin*, 1 Adol. & Ellis N. S., 20, (41 E. C. L. R., 422); *Davies* v. *Mann*, 10 Mus. & Welsby, 546.

*W. Winslow*, for the defendants:

There is nothing in the charge, of which the plaintiff can justly complain. The plaintiff's slaves were unlawfully upon the road of the defendants, and having substantially contributed to the injury, were the authors of their own wrong.

*Vanderplank* v. *Miller*, 1 Moody & Malk., 169, (22 E. C. L., 280).

*Pluckwell* v. *Wilson*, 5 Car. & Payne, 375, (24 E. C. L., 368).

*Lunsford* v. *Large*, Ibid., 375.

*Wolfe* v. *Beard*, 8 Car. & Payne, 373; *Hawkins* v. *Cooper*, Ib., 473, (34 E. C. L., 435, 485).

*Sills* v. *Brown*, 9 Car. & Payne, 601.

*Raisin* v. *Mitchell*, Ib., 613, (38 E. C. L., 245, 252).

*Williams* v. *Holland*, 6 Car. & Payne, 23, (25 E. C. L., 260).

*Greenleaf*, 473, and cases there cited.

*Hartfield* v. *Roper*, 21; Wendell, 615.

*Rathburn* v. *Payne*, 19; " 399.

*Hott* v. *Wilkes*, 3 B. & Alderson, 304, (5 E. C. L.).

No negligence has been shewn on the part of the defendants, and, to entitle the plaintiff to recover, he must shew carelessness by the defendants, or prove facts from which it can be inferred. Per TINDALL, C. J., in *Aldridge* v. *Great Western R. R. Co.*, 42 E. C. L., 276.

PEARSON, J. The *gravamen* of the action is negligence on the part of the defendants through their agent, and the question is, Was there evidence of negligence?

It was proven, that the cars ran over two negroes of the plaintiff, killing one and injuring the other; and the plaintiff insists, that, from this fact, the law implies negligence. The position is not tenable, that whenever damage is done, the law implies negligence. The bare statement of the proposition shows its fallacy. The cases of *Ellis* v. *Ports. & Roan. R. R. Co.*, 2 Ire., 138, and *Peggitt* v. *East. Co. Railroad*, 54 E. C. L. R., 229, were relied on as supporting this position. In both cases fire was communicated to the property of the plaintiffs—in the one case, a barn—in the other, a fence was set on fire by sparks from the cars. It was proven in both cases, that

the cars had been running for a long time without doing any damage, and, *things remaining in the same condition*, the fact, that fire was communicated on a particular occasion was properly held to be *prima facie* evidence, that it was the result of negligence. Judge GASTON, in the case of *Ellis*, lays down the rule in these words: "where the plaintiff shows damage resulting from the act of the defendants, which act with the exertion of proper care *does not ordinarily produce damage*, he makes out a *prima facie* case of negligence, which cannot be repelled, but by proof of care, or some extraordinary accident, which makes care useless." In other words, as the cars had been running under the same circumstances time after time without setting fire to the fence, if on a particular occasion the fence is set on fire, it must be ascribed to negligence, unless it can be accounted for, as by showing there was a sudden gust of wind, or some other unusual cause. In this case, the cars had been running for years without injuring a negro, because no negro had fallen asleep upon the track. That was itself an unusual circumstance, and repels any inference of negligence, from the mere fact, that damage was done, and therein this case differs from the cases of the fence and the house, which had remained stationary. The question of negligence then is open for inquiry.

What amounts to negligence is a question of law. Admitting the facts to be as contended for by the plaintiff, there was no evidence of negligence. The cars were running at the usual hour and at the usual speed, not through a village, or over a crossing place, or turning a point, but upon a straight line, where they could be seen for more than a mile. The negroes might have been seen at the distance of half a mile. Whether the engineer saw them or not until he was too near to stop, does not appear. There is no evidence that he was not in his place and on the lookout. It cannot be inferred from the

fact, that he made no effort to stop until he got within twenty-five or thirty yards of the negroes; for that is entirely consistant with the supposition, that he had seen them for a half mile; because, seeing them to be men, he naturally supposed they would get out of the way before the cars reached, and might well have continued under this impression, until he got near enough to see, that they were either drunk or asleep, which he was not bound to fore-see, and his being then too near to stop, so as to save them, was their misfortune, not his fault.

It there had been a log of wood on the tract, running over it would amount to negligence; for, if the engineer did not see it, there was negligence in not keeping a look-out, and if he did see it, there was negligence in not stopping in time, as wood has neither the instinct of self-preservation nor the power of locomotion. If there had been a cow on the track, the case would not be so clear, for the animal has both the instinct of self-preservation and the power of locomotion; but, on the other hand, it is known, that such animals lose their natural apprehension of danger by frequently seeing and hearing the cars. But as the negroes were reasonable beings, endowed with intelligence, as well as the instinct of self-preservation and the power of locomotion, it was a natural and reasonable supposition, that they would get out of the way, and the engineer was not guilty of negligence, because he did not act upon the presumption that they had lost their faculties by being drunk or asleep. If a deaf mute, while walking on the track, be unfortunately run over, it would certainly not be negligence, unless it was proven, that the engineer knew the man and was aware of his infirmity. If the cars are to be stopped, whenever a man is seen walking on the road, lest perchance he may be a deaf mute, and whenever negroes are seen lying on the track, lest they may be drunk or asleep, a knowledge of this impunity would be an inducement to obstruct the high-

way and render it impossible for the company to discharge their duty to the public, as common carriers.

We concur with his Honor as the competency of the captain as a witness for the defendants. He was in no wise responsible. But we do not concur in the opinion, "that the fault of his slaves in going to sleep on the road at the time and under the circumstances stated by the witnesses was imputable to the plaintiff." No fault is imputable to the owner for not preventing his negroes from going about on Sunday and lying down where they please, nor is the amount of care required of the defendants thereby "diminished." For this reason, we should be compelled to grant a *venire de novo*, if this construction could have influenced the decision of the case. But, as the plaintiff made out no evidence of negligence, this error was immaterial.

For the same reason it is unnecessary to notice the cases cited in the argument, as to the damage done, when there was negligence on both sides. We concur in the opinion, that, when this is the case, neither party can recover, unless one be guilty of wanton injury or gross neglect, which is much the same thing; for, if both are in equal fault, if one can recover so can the other, and thus there would be mutual faults and mutual recoveries, which would contradict the saying "that law is the perfection of reason."

PER CURIAM. Judgment affirmed.

THOMAS C. PASS v. THOMAS L. LEA.

A. being entitled to a distributive share in certain slaves belonging to an intestate's estate, before administration granted, conveyed by deed to B. certain of the said slaves specifically and by name. After letters of administration issued, B., who was also one of the next of kin, joined with A. and the other next of kin in a petition against the administrator for a settlement of the estate and a division of the slaves, and the slaves, which had been conveyed by A. to B. were, under the proceedings on that petition allotted to A;

*Held*, that in an action by B. against A. to recover the slaves, A. was estopped from denying that she had title to the slaves at the time she conveyed them;

*Held*, secondly, that the proceedings under the petition did not estop B. from asserting his title against A.

The cases of *Moove* v. *Willis*, 2 Hawks., 559; *Smith* v. *Gray*, 1 Dev. & Bat., 42; *Holding* v. *Holding*, Con. Rep., 525; and *Wright* v. *Lowe*, 2 Mur., 354, cited and approved.

Appeal from the Superior Court of Law of CASWELL County, at the Fall Term, 1849, his Honor, Judge *Settle*, presiding.

This is an action of detinue to recover certain slaves, mentioned in the plaintiff's declaration. The facts are as follows: John Gamble died in 1836, intestate, possessed of the slaves in controversy and others. He left, as his next of kin, a sister, Mrs. Gamble, the testatrix of the defendant, and four children of another sister, who died before him; of these children, Thomas Read, the testator of the plaintiff, was one. No administration upon his estate was granted until 1844, when letters issued to Nathaniel J. Palmer, who immediately took into his

possession all the slaves of his intestate. Thomas Read and Mrs. Gamble filed a petition for a partition of the slaves, the other children of the deceased sister of John Gamble and his administrator being parties defendant. Mrs. Gamble, by deed of bargain and sale, bearing date the 20th of January, 1844, conveyed the slaves sued for to Thomas Read, and died after the filing of the petition and before partition made. A partition was duly made and confirmed by a decree of the court, and the slaves so attempted to be conveyed by Mrs. Gamble were allotted to the defendant, her executor. On the behalf of the defendit was insisted, first, that the bill of sale executed by Mrs. Gamble to Thomas Read conveyed only one-half of the slaves in controversy, and that he, the defendant, was not thereby estopped from showing, that the other next of kin were interested therein, and should be parties plaintiff to the action. Secondly, although the deed from Mrs. Gamble to Thomas Read might have operated as an estoppel, yet the filing of the petition and the proceedings thereon were, in law, a transfer of record of whatever interest was in him in the slaves in question to the defendant's testatrix; and the plaintiff was estopped from claiming title to the same.

For the plaintiff, it was insisted, that, at the time of the execution of the bill of sale, Mrs. Gamble had no interest in the slaves, and consequently she and those claiming under her are estopped by it; whatever interest she subsequently acquired was acquired for the plaintiff or his testator, and consequently he was not estopped by the record of the proceedings under the petition.

Under the charge of the court, the jury found a verdict for the plaintiff and from the judgment thereon, the defendant appealed.

*E. G. Reade* and *Kerr*, for the plaintiff.
*Graham* and *Morehead*, for the defendant.

NASH, J. As to the first objection of the defendant, it is believed the doctrine of estoppel does not apply. It is in the nature of a motion to non-suit the plaintiff for want of parties. At the time the deed was made, there were three persons, the children of the deceased sister, who were, with Mrs. Gamble, entitled to the property of John Gamble. And it is insisted that the deed to Thomas Read conveyed to him only one-half of the slaves therein mentioned and he was consequently tenant in common with them. When the deed was executed, Mrs. Gamble had no legal or several estate in those particular slaves. Her only claim was for a distributive share of the estate of her brother, John Gamble, which might remain after the payment of his debts. Until the appointment of an administrator, the legal title may be considered in abeyance; but, as soon as letters issue, they vest the property in the administrator, and relate back to the death of the intestate. Without his consent or a judgment of a proper court, the next of kin have no right to intermeddle with it. The bill of sale operates, only as an equitable assignment of her interest in the whole estate of John Gamble to the value of those slaves. When, by the subsequent partition, these identical slaves were assigned to the defendant, the title of the plaintiff became complete by estoppel against Mrs. Gamble and all claiming under her. Judge HENDERSON in *Moore* v. *Willis*, 2 Hawks., 559, puts this case: If A. bargain and sell to B. by indenture, he thereby affirms he had title, when he executed the deed. And should A. not have the title at the time, but afterwards acquire it, in an action against B., the latter's title shall prevail, not because A. passed to him any title by his deed, but because A. is precluded from showing that fact. If this be so, and I presume it cannot be doubted, it puts an end to this objection. The bill of sale professed to pass a legal title to the slaves, which the bargainor had not, and she warranted the title. If she had lived until

after the partition, she could not have maintained an action for them against Thomas Read, and if he had sued her, she would have been precluded from denying his title. The other children of the deceased sister could not claim any interest in the slave in controversy, after the distribution under the partition. They could not be made parties to this suit. Their interest would have been antagonistic to Thomas Read's.

The second objection cannot avail the defendant. It is founded upon the idea, that, by the decree of the court on the petition, the legal title of Mrs. Gamble to the slaves in question was established, and the plaintiff's testator, being a party of record, was bound by it and estopped to deny her title. There cannot be a doubt, that matters, which have once been determined by judicial authority cannot be again drawn into contest, between the parties to the determination of their privies. It is equally true, that, when the cause of action is the same, the change of the action will not evade the principle. If, therefore, the same question was before the Court in that case, as is now controverted between these parties, the plaintiff is estopped. To give to a record, however, this conclusive effect, it must appear, among other things, that the matter averred is inconsistent with it, because, if it be consistent with it, it cannot be an exception. The conveyance by Mrs. Gamble was but an assignment of her equitable interest in John Gamble's estate to the value of the negroes conveyed. The legal title was in the administrator, and, until the division, it continued there. The petition was to distribute the slave property of John Gamble among his next of kin. Mrs. Gamble, who was his sister, and the testator, Thomas Read, who was one among the children of a deceased sister, were necessary parties. The only question was as to the division. The petition contained no allegation of any transfer by Mrs. Gamble to Thomas Read. The court

did not and could not consider any such question, for it was not put in issue by the pleadings. The plaintiff, then, in averring in this suit, that, before that proceeding took place, Mrs. Gamble had assigned to him all her equitable interest in the slaves, is averring nothing inconsistent with the record of that suit. But again an allegation in a record, to operate conclusively as an estoppel, must not be uncertain. An estoppel must be certain to every extent. Coke Lit. 303, 3526. "If, therefore, a thing be not precisely and directly alleged, it is no estoppel." The equitable interest of the plaintiff in the slaves was not by the record put in issue, either directly or indirectly; he is not therefore estopped to show the fact. It is admitted that the delivery of the slaves under the decree vested the legal estate in the slaves in controversy in the defendant, as the executor of Mrs. Gamble, but it was there only to feed the estoppel. Such is the case put by Judge HENDERSON in *Moore* v. *Willis*. And such was the decision in *Rawlin's* case, 4 Coke Rep., 52, in which it was held, that, if a man leased land in which he had nothing and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest, till he bought the land, but as soon as he had bought the land, it would become a lease in interest. The case of *Doe on the demise of Christmas against Oliver*, 2 Smith's Leading Cases, 417, is to the same effect. The case was, that one Ann Stephenson was entitled to an estate in fee, upon the contingency of her surviving a certain individual. While the contingency yet continued, she and her husband made a lease for a term of years and levied a fine to support it. She survived the tenant for life and the ejectment was brought to recover the term. It was admitted by the defendant, that the fine and the recovery operated by way of estoppel, bound the lessors and parties and privies, but it was insisted it did not bind strangers. The Court decided that it bound the lessors by estoppel or conclusion, so long as

the contingency continued, and that when the contingency happened, the estate that devolved upon them fed the estoppel, and the estate created by the fine ceased to be an estate by estoppel only, and became an interest. 2 vol. Thom. Coke, 488.

RUFFIN, C. J. If one sell and convey a chattel absolutely, he cannot afterwards say, he had no title at the time or a defective one, and for that reason take the thing back. In an action for it by the purchasers against the seller, the latter's conveyance must conclude the matter between them. It is impossible he could be allowed to justify the detention in direct opposition to his own sale. It must be the same when an action is brought against one claiming under or representing the seller; which is the case here, as the defendant alleges a newly acquired title in his intestate, who conveyed to the plaintiff's testator, and that such title came to the defendant as her administrator. It was admitted in the argument, that this was generally true. But it was insisted not to be so here, because the deed to the testator was made by one of the next of kin of an intestate, from whom the negroes came, and therefore that it passed her distributive share of them, and, consequently, that it could not create an estoppel. Now, an absolute sale of a personal chattel, unless there be a stipulation to the contrary, imports a warranty of title, where possession is delivered, and it would seem that the vendor could not recover the thing, nor withhold the possession of it from the vendee, against his own undertaking, that the title was good, upon such a quibble as that supposed, namely, that the title was at the time of the sale good for a month, or for an undivided tenth part of the thing sold. But in truth, it need not be considered here, whether the ancient technical rule alluded to, which concerns conveyances of land, can be applied to sales of personalty. For, a right to a distributive share is clearly

not an estate, of which any notice whatever can be taken at law, as the subject of a conveyance. *Smith* v. *Gray*, 1 Dev. & Bat., 42. It is a mere right to call the administrator to account and have a decree for distribution after the debts paid; and the next of kin have no legal property in any specific chattels, which may form parts of the effects. All the next of kin together cannot recover or convey a single slave. When the administrator has made a distribution, then, and not till then, do the next of kin acquire a legal interest or title. A decree against the administrator for distribution does not vest the legal right in things, decreed to the next of kin, but only operates *in personam*, and requires the administrator, in whom the title is, to convey it in such mode as will be effectual to vest the property at law; as, for example, to endorse bonds, make transfers of bank stock and public securities, or convey or deliver slaves; and until such endorsement, transfer or delivery, the next of kin has not the property and cannot sue as the legal owner, that is, in his own name. In a legal sense, then, the deed passed the property in the slaves to no extent whatever; and, consequently, if the subject were land, in which the vendor had but an equitable interest, the case would not be within the rule relied on for the defendant. Nor can the operation of the intestate's conveyance be affected by the decree in the suit against the administrator. The nature of decrees in equity has just been mentioned. They do not even profess to pass the legal title, and therefore they cannot create any estoppel in relation to it. It was said, indeed, that the petition was for partition among the next of kin, as tenants in common. Doubtless a partition of land or of slaves, under the statute, constitutes a legal title; for, the parties had a title of that kind before, and all they wanted, in addition, was that each one's share should be allotted in severalty, and the statute gives the judgment that operation. But

petitions for legacies and distributive shares and the decrees in them partake of the nature of the like proceedings in equity; *Holding* v. *Holding*, Conf. Rep., 525; *Wright* v. *Lowe*, 2 Mur., 354; and the suit in this case was against the administrator for distribution, and between tenants in common for partition. In itself, therefore, the decree can have no effect on the title to the slaves, either as a conveyance or an estoppel; and the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

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ELIPHALET VEAL v. WILLIAM C. FLAKE.

Where a man has been arrested under a *capias ad satisfaciendum*, and has given bond for his appearance at court; where an issue of fraud has been made up; where the issue has been continued from term to term; where his sureties have from time to time surrendered him; where the issue has been decided against him and he has been committed to prison in all these cases, at the instance of the creditor; *Held*, that, under the act, Rev. St., ch. 58; sec. 6, the creditor is responsible to the jailer for his fees or allowance for the food furnished to the prisoner, during the whole time he was confined in jail.

The cases of *Wright* v. *Roberts*, 6 Ire., 120, and *State* v. *Ellison*, 9 Ire., 274, cited and approved.

Appeal from the Superior Court of Law of ANSON County, at the Fall Term, 1849, his Honor, Judge *Dick*, presiding.

This was an action of assumpsit, commenced by warrant before a justice of the peace for Anson county, and brought by successive appeals to the county court, and from thence

to the superior court, to recover from the defendant an amount of jail fees alleged to be due the plaintiff, for feeding one John M. Williams, while in his custody as jailer of said county at the suit of the defendant for debt.

The evidence was, that the defendant had caused the said John M. Williams to be arrested under a *capias ad satisfaciendum*, dated May the 25th, 1844, for a debt due by the said Williams to the said defendant, and that the said Williams gave a bond for his appearance at the July term, 1844, of Anson county court, to take the benefit of the act for the relief of honest debtors; and at the said July term, 1844, an issue of fraud was made up, and continued from term to term until January term, 1846, when the said Williams having appeared, he was surrendered by his sureties, and on the prayer of Flake was ordered into the custody of the sheriff, who committed him to prison, where he remained five days, and then gave a new bond for his appearance at April term, to which the trial of the issue had been continued—that at April term, 1846, the said Williams again made his appearance, and was again surrendered by his sureties, and was again prayed and ordered into custody and again committed to prison, where he remained five days, and, the trial of the issue being again continued, he gave a new bond for his appearance at July term, 1846—that on the 1st day of June his sureties surrendered him to the sheriff, who committed him to prison, where he remained forty-four days until the trial of the issue of fraud at July term, 1846, when, being convicted of fraud, he was committed to prison, until he should make a full and fair disclosure; the prisoner having remained there four days under the said order, the plaintiff demanded of the defendant his fees up to that time incurred, alleging that the said Williams was unable to pay them himself, which it

was admitted was the fact, but the defendant refused to pay them or in any other way to satisfy the plaintiff. Whereupon the proceedings were instituted against him by warrant, as before stated. The defendant objected on the trial to the plaintiff's recovery, upon the ground that the only pretense for making the defendant liable was the provisions of the 6th section of the 58th chapter of the Revised Statutes, and that the said Williams, at the times the several claims of the plaintiff accrued, was not "actually confined within the walls of the prison by reason of *mesne* process for debt, *capias ad satisfaciendum*, or by surrender of bail after judgment."

The court being of opinion that the plaintiff's case was within the provisions of the act, a verdict and judgment were rendered accordingly; and, a rule for a new trial for misdirection of the judge on the point above stated being discharged, the defendant appealed to the Supreme Court.

*Strange*, for the plaintiff.

No counsel for the defendant.

NASH, J. The plaintiff's action is founded upon the 6th sec. of the 58th ch. of the Revised Statutes. Two questions are presented to the consideration of the Court. The first is, was Williams, the debtor of the defendant, Flake, in actual imprisonment *by reason of mesne process for debt, capias ad satisfaciendum, or surrender by bail, after judgment?* A *capias ad satisfaciendum* had issued at the instance of the defendant, Flake, under which Williams had given bond for his appearance at court, agreeably to the provisions of the statute. He duly made his appearance, and an issue of fraud being made up, the cause was continued. At the term when the issue was to be tried, the sureties of Williams surrendered him, and, on the motion of the plaintiff in that action, the defend-

ant, Flake, he was ordered by the court into the custody of the sheriff, who committed him to jail. This is not a new question here. In the case of *Wright* v. *Roberts*, 6th Ire., 120, it was decided that the *committitur* to the sheriff was in execution, and could not be in any other way. The debtor had been arrested on a *ca. sa.* and discharged out of the custody upon giving bond, and upon a surrender by his sureties, and on the prayer of the creditor, was ordered into custody. The *State* v. *Ellison*, 9th Ire., 274, is to the same effect. The Court then is of opinion that Williams, the debtor, was in *arcta custodia*, by reason of the *ca. sa.*, upon which he was arrested.

The second question is, is the creditor at whose instance a debtor is imprisoned, bound to support him, while in jail? By the common law an imprisoned debtor was obliged to support himself, and, if unable to do so, was dependent upon the humanity of the jailer or of others. The act of 1773, ch. 100, commonly called the forty shilling act, does not alter the common law in this particular, but limits the time of his confinement to the first twenty days, when, by pursuing its provisions, he may entitle himself to a discharge. So far as the question now before us is concerned, the law remained unaltered down to 1821. In that year an act was passed, by which it was made the duty of the jailer to furnish the prisoner with food for twenty days; "and he may, if the prisoner be unable to discharge it, recover the same of the creditor at whose instance such prisoner is confined," and limits the obligation upon the sheriff to furnish food, and of the creditor to pay for them to that time. In 1836, the legislature passed the act, whose provisions we are considering. It is manifest, that the legislature intended substantially to change the law upon this subject. The liability of the debtor to support himself, for the first twenty days of his confinement, is still continued, if he is able to do so; but if he is not, the burthen was not to be thrown upon the

jailer, nor upon the charitable, but upon the creditor, for whose benefit he is confined. By this act the creditor is bound, not only for the first twenty days, but for the whole time the debtor is confined at his instance. The act makes it imperative on the jailer to furnish his prisoners with proper food, if they require it, "and may, if the prisoner be unable to discharge the claim for them, recover the same from the party at whose instance such debtor was confined in jail; and, when the prisoner shall have remained in jail for the space of twenty days, it shall be lawful and sufficient, for the sheriff or jailer to give notice thereof to the plaintiff, &c., and to demand security of him, for the prison fees, that may arise after the expiration of twenty days; and if he shall fail to give such security then to discharge such debtor out of custody." For the first twenty days, the sheriff is compelled to rely upon the creditor, as his surety for the payment of the food furnished. But after that time, it is optional with him, whether he will or not. The debtor may be unable and the creditor not less so. To render himself secure the jailer is at liberty to call upon the creditor to give him additional security. Whether the creditor will do so or not, is at his own pleasure. But he nevertheless remains, under the act, liable for the food furnished to the creditor. It was not the intention of the act that the prisoner, if unable to support himself, should be maintained by the jailer or the public, but by his creditor. He was not to starve. We concur with his Honor, that the case is within the provisions of the 6th section of the act of 1836.

RUFFIN, C. J. Upon the words of the Revised Statute the action is maintainable; and it will appear perfectly plain to one, who traces the progress of our statute law, upon this subject, to its present state.

Originally an imprisoned debtor could no more call on the jailer or creditor for food than for clothing. The act

of 1773 left the law unaltered, except that in the 9th section it provided, that, if a debtor, not able to pay his prison fees, should after the expiration of twenty days be discharged by the creditors, the jailer might recover his fees from the creditor. Ire. Rev., 185. *Turrentine* v. *Murphy*, 1 Mur., 180. Then, in 1821, it was enacted, that the jailer should furnish necessary food to a debtor in prison, if required; and it entitled the jailer to charge therefor the legal fees for keeping prisoners, and, if the prisoners should be unable to pay them, to recover them from the creditor—with a priviso, however, that the jailer should not be obliged to furnish the food, nor allowed to recover for it, from the creditor, for a longer time than twenty days. Those acts are plainly expressed and rest upon a just principle. If the creditor choose to discharge the debtor, the jailer cannot detain him in order to coerce payment for the food supplied to him. Therefore it was right the creditor should be required to make the debt good, if it could not be got from the debtor, because he was not "an insolvent person." So the second act very properly required the creditor to provide reasonable food for his imprisoned insolvent debtor, rather than he should go without, or the burden of supplying it should fall on the jailer or other charitable persons. But it was then obviously deemed not right to extend that new privilege of the debtor to a longer term, than that for which the law deprived him of the other privilege of a discharge upon his oath of insolvency. For, if he was insolvent, it was his fault not to take the oath as soon as he was allowed to do it, and he could have no right under such circumstances to refuse to take the oath, in order that he might be maintained in jail at his creditor's charge. But if, in fact, he was not insolvent, and for that reason could not take the oath and entitle himself to his discharge, then he ought to be maintained out of his own means, and not by his keeper or creditor. Hence, the act fixed

upon twenty days as that, to which the obligation of the jailer and creditor to find and pay for the debtor's food should be limited; because that was the period, at which, if he would, the debtor might establish his insolvency by his oath and be discharged. The next step was to pass the act of 1836, ch. 58, sec. 6, by which it is enacted, as in 1821, that the jailer shall furnish the debtor with food, should he require it, and that he may, if the prisoner be unable to pay the fees therefor, recover them from the creditor. Then, in lieu of the proviso, comes this further enactment: "and when the debtor shall have remained in jail for the space of twenty days, it shall be lawful for the jailer to give notice thereof to the plaintiff, his agent, or attorney, and demand security from him for the prison fees, that may arise after the expiration of twenty days, and, if he shall fail to give such security, then to discharge such debtor out of custody." The act thus plainly imposes a positive injunction on the jailer to maintain the debtor indefinitely, or so long as he is kept in jail, and makes the creditor liable therefor from the beginning to the ending of the imprisonment, although the debtor will not take the oath of insolvency. Those affirmative provisions are subjected to but a single qualification, and that makes the matter stronger against the creditor; which is, that the jailer shall not be obliged to trust the creditor alone for the fees accruing after the first twenty days, but may require security for them, and, if the creditor should not give it upon request, the jailer may let the prisoner at large. The liability of the creditor is, therefore, absolute under all circumstances, provided only, the debtor be found not to be able to pay the fees; and, besides, the creditor must beforehand secure the payment, upon pain, on his inability or omission to do so, of having his debtor turned out of prison. That seems to be the clear sense of the

statute. It is true, it may put great hardships on creditors, as it allows the debtor to live in jail, as long as he chooses, at the expense of his creditor, or enforces his creditor to agree to his discharge without bringing him to his oath, and thereby may enable a dishonest debtor to conceal and retain property. But those are consequences for the attention of the legislature, upon consideration of which the statute may be modified. They cannot be regarded by the Court, so as, by construction, to control the plain language in which the act is now expressed.

PER CURIAM. Judgment affirmed.

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NATHAN FOSCUE, Adm'r, &c. v. ALLEN G. EUBANK, Adm'r, &c.

Where A. having a claim for a negro slave, sued out a writ of replevin, under which the sheriff seized a negro in the possession of B., which writ for some cause was quashed; *Held*, that A. could not sustain an action of detinue against B. until the slave had actually been restored to the possession of B.

In an action of detinue, the plaintiff must show an actual possession in the defendant of the thing demanded, at the time or shortly before the writ issues, or a controlling power over it.

The case of *Charles* v. *Elliott*, 4 Dev. & Bat., 468, cited and approved.

Appeal from the Superior Court of Law of JONES County, at the Spring Term, 1848, his Honor, Judge *Dick*, presiding.

The action is detinue for a slave, which was brought against one Dickson, and revived against his administrator. The plaintiff had demanded the slave from the

intestate, and, upon refusal, sued out a writ of replevin to the superior court of Jones, and Dickson gave bond with sureties for the performance of the judgment, according to the statute. Before the return of the writ the sureties became dissatisfied, and they obtained a warrant from a magistrate commanding the sheriff to seize the slave again, and he did so. On the day before the writ was returnable the sheriff's office expired. But he returned the writ, and, early on the first day of the court, which was Wednesday, it was quashed; and immediately afterwards, and while the old sheriff had the slave in his possession, this action was commenced by suing out the writ and delivering it to the new sheriff. On Wednesday evening the old sheriff applied to a gentleman, who had been Dickson's attorney in the replevin, to know, what he should do with the slave, and was told to deliver him to Dickson. He did not do so on that day, because Dickson was not at court; but on Thursday he carried the slave to Dickson's and delivered him. His Honor was of opinion, upon these facts, that the action would not lie, and the plaintiff was nonsuited and appealed.

*J. H. Bryan* and *J. W. Bryan*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. As the objection of the defendant is founded on very nice and technical reasons, the Court would willingly sustain the action, if it could be done without violating the principle, on which the detinue rests. Its object is to recover a thing specifically; and therefore the law gives it only against one, who, it sees, had it in his power, when sued, to deliver the possession thereby demanded of him. The gist of the action is the detainer at the date of the writ; and, hence, as was correctly stated in *Charles* v. *Elliott*, 4 Dev. and Bat., 468, it is incumbent on the plaintiff to show an actual possession in the defendant at

that time, or a general controlling power over the thing. In this case, the Court is of opinion, he showed neither. The plaintiff, it is true, had demanded the slave while Dickson had him; and, if the latter had afterwards parted from the possession, *mala fide* or voluntarily, that would not have defeated this action, because, as laid down in the case cited, it would have been taken to be in fraud of the action and not tolerated. For it is impossible to bring suit the next instant after the demand, and the possessor ought not to be allowed to elude the action for the thing, by covertly putting it out of his actual possession. But that has no application here; because the intestate did not put away the thing, but, either rightfully or wrongfully, it was taken from him without his fault and apparently against his will, and he had not re acquired it when this suit was brought. If the sheriff, for want of a bond from the intestate, had taken the slave from him, it is conceived, that certainly the plaintiff could not have dismissed the replevin and brought detinue before the possession was restored, although the sheriff, as he ought, might not have delivered the slave to the plaintiff upon his replevin, but have kept him. For, having caused the possession to be taken from the other party by process, sued with the view to secure the ultimate recovery of the slave, specifically in one manner, he ought not to abandon that method, and resort to detinue on the previous possession of the defendant, but only on its restoration. It could make no difference, as to the right to bring detinue, that the sheriff did wrong in keeping the slave from both of the parties; for by such wrong the defendant was deprived both of the actual possession and of any controlling power over the slave. The sheriff did not pursue exactly that course here; but he did, substantially. After having left the slave with the defendant in replevin, he illegally seized him under color or pretense of the same process, and he

actually held him when this writ was sued. The possession cannot be deemed the possession of Dickson, for the purposes of this action. For, at any moment, from that in which the sheriff took the slave to that in which he restored him, it is apparent, that the sheriff was liable to Dickson in detinue; and it seems impossible to hold, that Dickson, as a person wrongfully deprived of the possession of his slave, might recover from one person, and likewise to hold, that, without any act on his part in fraud of the law, he was liable to the action of detinue, as at the very same time having the possession. It is in that respect this case differs from that of *Garth* v. *Howard*, 5 Carr & Payne, 346, and other cases, in which the defendant was held liable upon the ground, that he still had the control of the thing, having only pledged or bailed it. A bailment of any kind by Dickson is not pretended. On the contrary, it cannot be doubted that the sheriff was a trespasser under color of the replevin; and he might have been sued in detinue or trover by either Dickson or the plaintiff, whichever had the title. The return of the slave to Dickson, after this suit was commenced, can make no difference; for the question is, whether the plaintiff was entitled to the action when he brought it, and subsequent events can have no influence on that question, unless they were of a kind to show, that the possession of the sheriff was derived under the defendant in some manner, that did not divest him in law and fact of his general power and control over the property.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF HENRY BRANNOCK v. NATHANIEL G. BRANNOCK

Where a deed of trust is given for the security of several debts, some of which are *bona fide* and some tainted with usury, the deed is not void as to the *bona fide* debts, provided these debts are separate from, and unconnected with, the usurious debts.

The case of *Shober* v. *Hauser*, 4 Dev. & Bat. 91, cited and approved.

Appeal from the Superior Court of Law of ROCKINGHAM County, at the Spring Term, 1849, his Honor, Judge *Dick*, presiding.

This is an action of ejectment, to recover the possession of the tract of land set forth in the plaintiff's declaration: both parties claimed under Thomas Thompson. The defendant claimed under a deed of trust, duly executed and registered in the register's office of Rockingham county. The plaintiff claimed under a sheriff's deed, founded on judgments and executions, levies and sale duly made by the sheriff. It is admitted by the parties, that among the debts secured under the trust, there is an amount sufficient to cover the value of the property conveyed in the trust, which are *bona fide*, and not affected by usury. It is also admitted, that among the debts, secured under the trust, there are debts founded on usurious considerations, to an amount sufficient to cover the value of the property conveyed; and that the deed of trust is prior in date and registration, to the judgments and executions, under which the plaintiff claims. If in the opinion of the court, on this statement of fact, the plaintiff is in law entitled to recover, the defendant being in possession, there is to be a judgment for him; otherwise judgment

for the defendant. His Honor, being of opinion with the defendant, *pro forma*, give judgment accordingly, and directed a nonsuit, from which judgment the plaintiff prayed and obtained an appeal to the Supreme Court.

*Morehead*, for the plaintiff.
*Iredell*, for the defendant.

PEARSON, J. The only question is, whether a deed of trust is void, which was made to secure several debts due to different individuals, some of which debts are usurious? It is not void. The estate passed, and is a security for the debts not tainted with usury. The declarations of trust, only in reference to the usurious debts, are void.

In *Shober* v. *Hauser*, 4 Dev., & Bat. 91, it is held that a deed of trust, made to secure a usurious debt, is void; in that case there was but one debt secured, which debt being usurious, the deed could only operate as an "assurance for a usurious debt," and was properly held to be void.

But, in this case, there are several debts due to different individuals; some of them are not tainted with usury, and are in no wise connected with those that are. The operation of the deed was to pass the legal estate, with a *separate declaration of trust*, for each of the debts therein enumerated. There can be no reason, why the declaration of trust, in reference to one debt, may not stand, and the declaration of trust in reference to another be held void. So if a deed contains a declaration of trust, in favor of several debts, one of which is feigned, and there be no connection or combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust, in favor of the true debts, may not stand and the feigned debt be treated as a nullity.

If a bond secures the performance of several covenants on conditions, some of which are legal and the others void, it is valid, so far as respects the conditions that are legal, provided they be separated from and are not dependent on the illegal. But if a contract be made on several *considerations*, one of which is illegal, the whole contract will be void. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the debts are illegal, the illegality of such as are bad does not communicate itself to or contaminate those which are good, except where from some peculiarity in the contract its parts are inseparable, or dependent upon one another. 1 Smith's Leading Cases, 284, note to *Collins* v. *Blanton* and the cases cited. Here the *consideration* which raised the use, for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals and in no way connected with, or dependent on, one another—the deed is valid so far as respects the good debts. It would be unreasonable and defeat the object of deeds of trust, if they are to be declared void, and honest creditors deprived of their security for debts, because the debtor, without their knowledge or concurrence, may insert an usurious or feigned debt. No one would bid at a trustee's sale, if he could be deprived of his title, by showing that one of many enumerated debt, was tainted with usury. The case of *Harrison* v. *Hanent*, 5 Taunt., 780, was relied on for the plaintiff. The case is not an authority against the conclusion above announced, but tends, we think, greatly to confirm its correctness. The son of the defendant owed several debts to the plaintiffs, some of which were usurious; and wishing to get a further advance, agreed to draw three bills upon his father as a security for the whole. The bills were accepted and the first paid; but, in a suit on the second, it was held to be

void, because it was a security for the amount, in which were included some usurious debts. Although it was urged that the amount of the first and second bills would not exceed the amount of the good debts, the reply was that, if the plaintiff was allowed to recover, he could apply the amount to the bad debts and sue the son on the good debts; that it was the same as if the son had given his note, with his father as security, for the whole debt. The contract was entire. The security was given as well for the illegal as the legal part; they are connected together and cannot be separated; which distinguishes it from this case. Here the debts are connected; one may be paid and another rejected. It is the duty of the trustee to pay the good and reject the bad ones. It is the same as if a separate deed of trust for each of the creditors had been executed.

PER CURIAM. Judgment affirmed.

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DOE ON DEMISE OF JOHN STOWE, et al., v. JONATHAN DAVIS, et al.

A. devised as follows: "I give to the lawful heirs of my son B., deceased, the plantation whereon I now live." "I give to my sons C. and D. and their children, the residue of my estate, both real and personal," &c. *Held*, that although the testator had bought a tract of land, adjoining that on which he had previously lived, yet as he cultivated the two as one farm for many years, they were both to be included in the devise to the heirs of B. as "the plantation on which he then lived."

It is not competent, in the construction of a will, to prove by witnesses that the testator meant a clause in his will to be different from what it was written, or afterwards declared that the clause, as written, was different from the purport of it on its face; though evidence of parcel or not parcel of the thing devised, or any other that serves to fit a thing to the description, is admissible.

The case of *Bradshaw* v. *Ellis*, 2 Dev. and Bat. Eq., cited and approved.

Appeal from the Superior Court of Law of SURRY County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

The respective parties claim, under the will of Abram Stowe, in which he devised as follows: "I give to my wife the plantation on which I now live, during her life, one horse," &c. Then after several gifts of chattels to others, follows this clause: "Fourthly, I give to the lawful heirs of my son, Abram, deceased, the plantation whereon I now live." Seventhly, I give to my sons, John and Joel, and their children, the residue of my estate, both land and negroes and personal property." The will contained dispositions of personalty, not material to this controversy.

The question on the trial was, whether the premises passed to the heirs of Abram, under the gift in the fourth clause of "the plantation," whereon the devisor lived at the making of the will, or to the devisees in the seventh clause of the residue of the land; the latter of whom are the lessors of the plaintiff. Evidence was given that, for some years before the date of the will, the testator owned four tracts of land, which he had purchased from different persons at different times. He lived on one of the tracts, and had a considerable farm on it, which he occupied himself. He then bought an adjoining tract from one Brown, whereon there was no building, but a field cleared, containing about forty acres, which laid immediately adjoining the cleared land, which the testator had before cultivated as aforesaid, and there was a fence near the line between them. The testator, afterwards, during his life cultivated, as one farm, the cleared land on his original tract, and that on the tract purchased from Brown; all being enclosed by the same fence, but still the fence on the line between the two tracts was kept up, running from the river on which the land was situate, back to the said outside fence. After the purchase from Brown, the land so bought was called by the testator "the Brown place," and that which he before owned he called "the home place." The other two tracts

he called, the one, "the Gentry place" and the other, "the Oliver place," after the persons from whom he purchased them. The action is for the tract bought from Brown, and upon that evidence a verdict was rendered for the plaintiff, subject to the opinion of the court upon the question reserved, whether, upon the facts stated, the lessors of the plaintiff were entitled to the premises, or not. Judgment was afterwards given for the plaintiffs, and the defendants appealed.

*Boyden*, for the plaintiffs.

No counsel for the defendants.

RUFFIN, C. J. The Court holds, that the premises passed to the widow for life, with remainder to the heirs of Abraham, under the description of "the plantation whereon I now live." If the case stood upon the words of the will alone, without any evidence respecting the two tracts of land, upon parts of both of which was situate the portion under culture by the testator, there could be no doubt. "The plantation on which the owner lives" would certainly be understood generally to be all the contiguous land of the proprietor, which he resided on and made one parcel, by using different portions of it for his own culture for a series of years, although it may originally have constituted several tracts, and although some parts of the body, and of the several tracts, which made up the body, may remain uncultivated and uncleared. The term "plantation" has several significations; but a man's plantation at such a place is understood by the bulk of the people here to be the land he owns at that place, whereof he is cultivating more or less in annual crops. More properly, it designates the place planted; but in wills it is generally used to express more than the enclosed and cultivated fields, and to take in the necessary wood land, indeed, commonly all the land forming the

parcel or parcels under culture as one farm, or even what is worked by one set of hands. *Bradshaw* v. *Ellis*, 2 Dev. & Bat. Eq., 20, was a case of the latter kind, in which, upon the whole will, the Court held, that "my plantation" carried two tracts, which were half a mile apart, as they were both cultivated together by the testator as one farm. This construction is not at all varied by any of the facts proved. There is no attempt to establish, that any particular part of the contiguous land was known and called the testator's plantation, separate from some other of the parts under culture. On the contrary the proof was merely, that different parts of the plantation were called by the distinct names of "the Brown place" and "Home place." But that was nothing more than a mode of designating the different fields, which make up the farm; which, instead of "farm," the testator calls by the term "plantation," which is the more familiar to the mass of our citizens. If the devise had been of the "Home place," or "the Brown place," then those particular well-known names would have controlled more general words of description. But the gift is not by the name of either of the parcels, but by a general one, "plantation," which in fact embraced both parcels. As all the land, which was actually in culture, is embraced by the term "plantation," in its strictest sense, that must, of course, pass. But the devise cannot be restricted to that. For, of necessity, it is to be supposed the testator meant to give with it the contiguous wood land, or, at least, as much of it as should be requisite for a supply of timber and wood; and, as he has pointed out no mode of ascertaining how much he deemed requisite, or what particular part he intended, the Court cannot say, that less than the whole was given. For these reasons the Court deems the judgment erroneous.

As there must be a *venire de novo*, it will perhaps facilitate the next trial to dispose of a question of evidence,

stated in the record. Besides the evidence given, the plaintiff offered to prove, that, when about to make his will and while making it, the testator said he wished to give "the home plantation" to his wife and Abraham's heirs, and the "Brown place" to Joel and John and their children; and that, after the will was made, the testator showed a person the dividing line between those two places, and said, that he had given the former to his wife and Abraham's heirs, and the latter to John and Joel and their children. Upon objection the court rejected the evidence; and, we think, properly. Evidence of parcel or not parcel is competent, or any other that serves to fit a thing to the description. But as we had occasion to say in the late case of *Barnes* v. *Simms*, it is not competent, upon a question of construction, to prove by witnesses, that a testator meant a clause in his will to be different from what it was written, or afterwards declared that the meaning of the clause, as written, was different from the purport of it upon its face. That would be to control the writing, or, rather to make a new will by parol. The evidence was, therefore, inadmissible. But on the first ground the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*.

COMMISSIONERS OF NEWBERN to the use of JAMES H. PRITCHETT v. JOHN B. DAWSON, et al.

The Commissioners of Newbern recovered a judgment against the sheriff and his sureties for the amount of the taxes due to the town, which he had failed to pay over. Afterwards one of the sureties had the money paid and an assignment made to a third person of the judgment, by the attorney of the Commissioners, which was afterwards ratified by the Commissioners, and a receipt was given by the treasurer of the board to the sheriff, to enable him to renew his bonds;

*Held*, first, that the payment of the money and the assignment to a third person of the judgment, did not amount in law to a payment and satisfaction of the judgment, as against the defendants therein;

*Held*, secondly, that, although the receipt may have operated as a fraud upon the court, yet it is not conclusive as to the fact of payment by the defendants in the judgment, but may be explained;

*Held*, thirdly, that, though a judge is not required to respond in the very words of an instruction prayed for by counsel; yet it is error, if he does not substantially meet the matter of law, and put the matter of fact directly to the jury.

Appeal from the Superior Court of Law of CRAVEN County, at the Fall Term, 1849, his Honor, Judge *Manly*, presiding.

This was a *sci. fa.* to Phillip Pipkin, administrator of John B. Dawson, deceased, to revive a judgment recovered by the commissioners of the town of Newbern, at the February Term, A. D. 1843, of Craven county court against his intestate, John B. Dawson, Joseph L. Bryan, John Bryan and John M. Bryan, sureties to his bond, for the default of the said Dawson, as sheriff of Craven county, in not paying over the town taxes due on the property listed in 1841, brought up to the superior court by appeal from the county court. The pleas are *nul tiel record*, payment, accord and satisfaction, release.

The plaintiff introduced the record of the judgment upon which the *sci. fa.* issued.

James W. Bryan was examined as a witness and testified, as stated in the annexed paper, (marked B,) which is referred to for greater certainty as a part of the case.

Allen Grist proved thatt he money was paid by Patrick M. Bryan, and the assignment made to Pritchett was for his benefit, and, it was by his instructions, that the witness made his return upon the *venditioni exponas.*

The defendant exhibited and proved a receipt in writing to his intestate from Thomas S. Gooding, Jr., the treasurer of the commissioners, for the taxes due on the property listed in 1841, bearing date 15th day of August, 1843, which for greater certainty is referred to as part of the case and marked (C).

Thomas S. Singleton, introduced on the part of the defendant, who was commissioner and intendant of police at the time the judgment was recovered, and also at the time the assignment was made, proved than he had been instructed by the board of commissioners to employ an attorney to collect the taxes, due on the property listed in 1841, from the sheriff, and that he had accordingly employed the services of James W. Bryan for that purpose, but had not received from the board of commissioners any authority to sell and assign the debt, and had not therefore given any. He further proved, that, on the day after the assignment, John B. Dawson exhibited his receipts to the county court, as required by law, and was permitted to renew his bond and to qualify as sheriff of Craven county, to which office he had been elected for the term of two years from August, 1843.

It was admitted, that no other money had been paid on the execution except that by P. M. Bryan—that Gooding was the treasurer whose duty it was to receive all the money due to the town, and to dispose of the same under the directions of the commissioners. It was also

admitted that the money paid by P. M. Bryan went into the treasury of the commissioners, was received by them and disposed of to the use of the town, and also that the *sci. fa.* was issued in the name of the commissioners by the assignee, Pritchett, and was prosecuted for the benefit of Bryan, and with the acquiescence of the commissioners.

The counsel for the defendant contended that the receipt to Dawson was a satisfaction of the judgment—that the money advanced by Bryan would in law operate as a payment, unless there was a valid assignment of the judgment—that neither the attorney or treasurer had the authority to sell or assign it—that, if they had been made by the special instructions of the commissioners, and it was a part of the agreement, that Dawson should have a receipt from the treasurer to enable him to renew his bonds, the contract was void and could not be set up by the assignees as an explanation of the receipt.

The defendants' counsel requested the instruction, that there was no evidence of any authority from the commissioners to the attorney or treasurer to sell or assign the judgment.

The court instructed the jury, that the receipt, produced by Dawson's administrator, was not conclusive in its nature, but liable, pursuant to well-established principles, to be explained, and it was therefore their duty to inquire, upon a due consideration of all the testimony, whether the money advanced by P. M. Bryan was intended between the parties as a *satisfaction*, according to the words of the receipt, or a *purchase*. If the money was paid by P. M. Bryan in order to effect a *purchase*, and so received by the treasurer of the company, with the approbation of the intendant, the transaction could not be *invalidated as such*, or in other words operate as a payment and extinguishment, because there was no previous authority in their corporate capacity to sell. The

want of a previous power if it were necessary, would at any rate be cured by a subsequent ratification of the act, reception and use of the money, thus raised, if such were the fact.

Supposing there had been an after-arrangement between Dawson and the treasurer of the commissioners, by which the receipt in question was to be given, and an imposition thus practiced upon the court, in the renewal of the sheriff's bonds; and supposing further, that the sheriff could avail himself of his own fraud, such an arrangement would not affect injuriously the rights of one not a party to it. Indeed, if there had been an original fraudulent design entertained by Dawson and Gooding, afterwards carried into effect by the execution of the receipt, it would not invalidate the transaction as a purchase, unless the purchaser participated in it. Under the instructions the jury found a verdict for the plaintiffs, and from the judgment thereon the defendants appealed.

(B.)

[*James W. Bryan's testimony.*]

I was employed by Henry S. Singleton, Esq., the intendant of police of the town of Newbern, to obtain judgment against John B. Dawson, sheriff of Craven county, and his sureties, for the town (Newbern) taxes, due on the property listed in the year 1841. This judgment was obtained according to the due course of the court in Craven county court, and the execution was issued to the sheriff of Beaufort county, the defendant, in the same, Dawson being sheriff of Craven, and there being no coroner of Craven county. At the August term, A. D. 1843, it became necessary that John B. Dawson should renew his bond as sheriff of Craven, and, on Monday, when I went to the court-house and before I entered the court-house, I met at the door Allen Grist, the sheriff of Beaufort, Thomas S.

Singleton and Thomas S. Gooding, also one of the commissioners of the town of Newbern and treasurer, as I was informed subsequently, of the board of commissioners. There was much conversation about Dawson's being unable to renew his bonds in consequence of his inability to settle the public dues and produce the required receipts, but by whom this conversation was had I am unable now particularly to say. P. M. Bryan came to me and asked me, if he could not purchase the execution in question in favor of the commissioners of Newbern, and have *it assigned to him.* I told him he could certainly do so, and I left them all below stairs and went up into the court-room. Shortly thereafter, Thomas S. Singleton, Allen Grist, sheriff of Beaufort, Thomas S. Gooding and P. M. Bryan came into the court-room. Thomas S. Singleton, Allen Grist and Thomas S. Gooding came into the bar—the former took his seat on the left-hand side of the bar and Thomas S. Gooding and Allen Grist seated themselves on the same bench beside me on the right-hand side of the bar. Upon taking their seats, Thomas S. Gooding remarked to me, we have arranged this execution with P. M. Bryan and he is to pay the money and take an assignment of the execution, and we wish you to make the calculation and assignment, and thereupon Mr. Grist laid the execution before me on my table. I made the calculation and wrote the receipt and assignment, as appeared on the execution, having previously asked to whom the assignment should be made, whereupon P. M. Bryan, who was standing at my back outside of the bar, remarked that he wished it made to *Mr. Pritchett.* P. M. Bryan then handed to me some money and one or two checks of the Wilmington branch of the Bank of the State on the bank here, which were payable to said Bryan and endorsed by him. Upon the receipt of these moneys and before I would settle with Thomas S. Gooding, knowing that he was of dissipated

habits, I inquired aloud if Mr. Gooding was the treasurer of the commissioners of the town of Newbern and was informed that he was. I thereupon paid Mr. Grist his commissions, gave my check to Thomes S. Gooding, as treasurer of the commissioners of Newbern for the amount due the commissioners on the execution, and also gave my check to P. M. Bryan for the balance due him, the checks exceeding the amount due on the execution, and Thomas S. Gooding signed the receipt and I accordingly made the assignment. Thomas S. Singleton, who all this time was sitting on the opposite side of the bar, asked if the business was completed or the arrangement made, I do not know which, and upon being informed that it was, they all left the bar.

I had no special authority from the commissioners to make the assignment of the execution, other than what took place as herein stated with Thomas S. Singleton and Thomas S. Gooding, both of them at the time being commissioners of Newbern, the former the intendant of police, and the latter treasurer of the board, and I acted in the matter as I then and now conceive, under their instructions alone. The advancement of the money was intended by the parties to be a purchase, out and out, of the execution, and the money due upon the same, and was so expressed at the time when I was sitting in the bar. John B. Dawson was not present, when this transaction took place. Thomas S. Gooding received the moneys for my check on the Bank of the State. I deemed it best, as Gooding was a dissipated man, for my own protection, that he should put his receipt on the execution, but P. M. Bryan had nothing to do with this transaction of taking Gooding's receipt. I knew nothing of any other receipt given by Gooding, and no mention was made of such a thing to me.

(C.)

Received of John B. Dawson, sheriff of Craven county, six hundred and sixty-eight dollars and fifty-nine cents, (668.59,) being the amount of taxes due to the commissioners of the town of Newbern, for 1841, and being all that is due to the said commissioners from the said Dawson.

THOMAS S. GOODING, Jr., Treas'r.

August 15th, 1843.

*W. H. Haywood*, for the plaintiffs.
*Donnell*, for the defendants.

PEARSON, J. The counsel of the defendants insisted, that the money, advanced by Bryan, would in law operate as a payment, unless there was a valid assignment of the judgment.

This position is untenable. It is well settled that judgments, as well as notes, may be kept up for the benefit of a surety, who advanced the amount of the debt to the creditor. This could not be, if a valid assignment was necessary; for judgments are not negotiable, and an assignment does not pass the legal interest. If the money be advanced by the surety, it is presumed to be a payment, and it is necessary to rebut this presumption, by taking an assignment to a third person. If it be a note, the legal interest passes to the assignee, to the use of the surety. If a judgment, the legal interest does not pass; and the only effect of the assignment is to rebut the presumption of payment by an unequivocal act, showing the intention to be, to keep up and not extinguish the judgment.

If the money be advanced by a third person, (as was done in this case,) there is no presumption of payment, for a payment cannot be made by a stranger, and there is no

occasion for an assignment. The only purpose it can answer, when the security is not negotiable, is to furnish proof, in reply to any that, by possibility, might be made, tending to show that the money belonged to the debtor. For such purpose it is n t necessary that the assignment should be valid; it is sufficient for it to be made by the person to whom the money is paid, as explanatory of the act—a part of the *res gestæ*, showing the intention.

The counsel further insisted, that "if it was a part of the agreement, that Dawson should have a receipt from the treasurer to enable him to renew his bonds, the contract was void, and could not be set up in explanation of the receipt."

The charge in respose to this, is "supposing there had been an after-arrangement between Dawson and the treasurer of the commissioners, by which the receipt in question was to be given, and an imposition thus practised upon the court in the renewal of the sheriff's bonds; and supposing further, that the sheriff could avail himself of his own fraud, such an arrangement would certainly not affect injuriously the right of one not a party to it. Indeed, if there had been an original fraudulent design, entertained by Dawson and Gooding, afterwards carried into effect by the execution of the receipt, it would not invalidate the transaction as a purchase, unless the purchaser participated in it."

The defendant excepts, because the charge is not responsive to the instruction prayed. We think the exception well founded. The instruction, prayed for, is not stated with much distinctness, and it is probable that in the hurry of the trial, his Honor did not fully apprehend it; it alleges, as a fact, that Bryan was a party to the fraudulent agreement, and as a matter of law, that if such was the fact, the plaintiffs could not explain the receipt.

If the court was against the defendants, upon the law, they had a right to have the opinion positively expressed; if with them, to have the fact *directly* and distinctly submitted to the jury. We infer that his Honor was with the defendants, upon the matter of law. But the fact was not directly and distinctly left to the jury. The first proposition, which supposes an after-arrangement between Dawson and the treasurer; and the second, which supposes, that Dawson could take advantage of his own fraud; and the conclusion, that such an arrangement would not affect injuriously the right of one, not a party to it; do not touch the instruction prayed for.

The last proposition, that if there was an original fraudulent design between Dawson and Gooding, it would not invalidate the transaction as a purchase, unless the purchaser participated in it, is an *inferential* expression of opinion, in favor of the defendants as to the law. But it does not bring to the notice of the jury, the matter of fact, whether Bryan was or was not a party or privy to the fraud. In the prominent and direct manner, in which the defendants had a right to have it presented, it was the pivot upon which the case turned, so far as the jury were concerned, yet it is introduced indirectly, with the word "unless," treating it as a new qualification of a preceding proposition.

A judge is not required to respond in the very words of the instruction, but it is error, if he does not substantially meet the matter of law and put the matter of fact directly to the jury.

The defendants are entitled to a new trial, if the matter of law be with them, assuming the fact to be as they allege.

The agreement was a fraud upon the public; if it was executory, no court would enforce it; but it was executed and the inquiry is as to its effect.

The defendants insist, that as a fraud was practiced upon the court, by Dawson and the treasurer of the plaintiffs and Bryan, for whom the plaintiffs hold the legal estate, the receipt by which the fraud was effected cannot be explained, and it must be taken as a fact, that Dawson did pay the judgment.

It is clear that this is not according to the truth, for Dawson never paid one cent. The money belonged to Bryan and he allowed Gooding to give Dawson a receipt for the taxes of property listed in 1841, by which the court were deceived. Upon what principle can this establish a payment by Dawson, or shut out the truth, as between the parties to the fraud? If, instead of a receipt for the taxes for which the judgment was taken, satisfaction had been entered upon the record, that would have discharged the judgment (as a release discharges a bond) and the parties would have been concluded. But a receipt never concludes; it is merely a written admission, and may be explained like a verbal one. Here the very fact of the fraud explains the receipt, and shows how it happened to be given when no money was paid by Dawson. It is a key to the transaction, and opens it at once. Bryan advanced the money, took the judgment as a security, and permitted a falsehood to be certified to the court, to accommodate his friend Dawson.

Relieved of all collateral matter, it is simply this case: a creditor gives his debtor a receipt, (no money being paid,) to enable him to acquire a false credit; does that pay the debt, or prevent the creditor from explaining the receipt? What right a person, defrauded by such a falsehood may have, is another question. The debtor cannot, on a receipt, except as evidence of a payment, and the other evidence shows it to be false.

Upon the whole the defendants have no right to complain,

PER CURIAM. Judgment affirmed.

DEN ON DEMISE of ANN PIERCE v. ANTHONY A. WANETT.

When the real plaintiff in ejectmeut is a tenant in common, though he may declare for the whole, he has not an absolute right to have a verdict for the whole, but the jury may render such a verdict, leaving the plaintiff to take possession at his peril. The more correct course, however, is, when the extent of the title can be seen with reasonable certainty, to set forth in the verdict the undivided share, to which the title appeared, and to enter the judgment accordingly.

Upon the probate of a deed for land by husband and wife, the wife residing in another state, a commission to take the private examination of the wife may issue from the court of the county where the land lies, under the act of 1751. In the Revised Statutes, by a misprint, the word "*country*" in the act, of 1751, is changed to the word "county," but, from the context, the construction of the Revised Statute must be the same as that of the act of 1751.

In order to be allowed to introduce in evidence the deed of a married woman, the following facts were proved: "that upon the record of New Hanover county court, at August term, 1818, there was an entry in these words: Ordered that John McCall and David Jones be appointed to take the private examination of Sarah Pierce, wife of Peter, touching her free execution of a deed executed by them to Samuel Potter, dated July 21st, 1818. On the 10th of August the clerk issued a commission to the said McCall and Jones, as residents of New Hanover, to take the privy examination of the *feme*, reciting that the deed had been proved in the county court, and that it had been represented to the court that the said Sarah could not travel, &c., and upon it the commissioners on the same day returned the private examination," and then follows an entry on the commission, that the execution of the deed was proved by McCall, who, and Jones, are the subscribing witnesses; upon which it was registered: *Held*, that this was not sufficient proof of the execution of the deed by the wife.

The cases of *Burgess* v. *Wilson*, 2 Dev., 306; *Godfrey* v. *Cartwright*, 4 Dev., 487; and *Lenoir* v. *South*, 9 Ire., 237, cited and approved.

Appeal from the Superior Court of Law of New HANOVER County, at the Fall Term, 1849, his Honor, Judge *Dick*, presiding.

PIERCE *v.* WANETT.

This is an ejectment for a lot in Wilmington, which Abraham Golden purchased in 1813 in fee, and of which he died seized, in 1815, and without issue. The action was commenced in April, 1845, and the demise is laid on the 1st of January, 1840, for ten years and is for the whole lot.

The lessor of the plaintiff claimed by descent from Golden, as the daughter, and only surviving child of Sarah Fleming, who was a daughter of a sister of Golden. As a declaration by Golden of the state of his family, the plaintiff gave in evidence his will, made in 1808; wherein he gave parts of his estate to his sister Nancy Garret and her husband James Garret, and to his two nieces Sarah Fleming and Ann Fleming, and to Abraham Golden, son of his brother William, and the other children of his said brother, and to the children of his brother James, and the residue of his estate to his wife Rachel for her life. The plaintiff also examined one Peter Pierce as a witness, who deposed that the said Sarah and Ann were the daughters of a sister of said Golden and resided in Maryland; and that, in August, 1816, the said Sarah and the witness intermarried there, while she was an infant, and that they always resided there until the death of Sarah, which happened in 1835. The witness further deposed, that he and the said Sarah had issue three children, of whom one died in the lifetime of the said Sarah, and the other two survived her; that one of them was named William Henry, who was born in March, 1820, and died before this suit was brought; and the other was Ann, the lessor of the plaintiff, who was born November 15th, 1823, and has never been in this state. The witness further deposed, that neither the said Sarah nor he was in possession of any land in this state during their intermarriage; and also that Ann, the aunt of the lessor of the plaintiff, married one William Pierce, while she was an infant, and they

are both still living in Maryland; and also that James Garret and his wife Ann died in or before 1832, without issue.

The plaintiff further gave evidence, that the defendant was in possession of the lot and had been ever since 1828; but he gave no direct evidence that any person was in possession after the death of Golden, until the defendant entered.

The defendant then gave in evidence a deed from James Garret and his wife for the premises in fee to Samuel Potter, dated October 27th, 1847; also a deed from the witness Peter Pierce, and his wife Sarah, to the said Potter, dated July 21st, 1818. The latter deed recites, that the bargainors believed they were entitled to part of the reversion of the real estate of Abraham Golden, deceased, after the death of said Golden's widow, then the wife of said Potter, and that, without admitting the same to be true, the said Potter, in order to save lawsuits, was willing to pay a certain sum of money to the said Pierce and wife; and, then in consideration of $100 paid, it purports to grant, and bargain, and sell to Potter and his heirs all the right, title and interest in the real estates in North Carolina, which those persons derived from the said Golden. As to the probate of this deed, the following facts are stated: Upon the record of New Hanover county court, at August sessions, 1818, is an entry in these words: "Ordered that John McColl and David Jones be appointed to take the private examination of Sarah Pierce, wife of Peter Pierce, touching her free execution of a deed executed by them to Samuel Potter, dated July 21st, 1818." On the 10th day of August, 1818, the clerk issued a commission to the said McColl and Jones as residents of New Hanover, to take the privy examination of the *feme* reciting that the deed had been proved in the county court, and that it had been represented to the court that the said Sarah could not travel,

&c.; and upon it the commissioners on the same day returned the private examination, and then follows an entry on the commission, that the execution of the deed was proved by McColl, who and Jones are the subscribing witnesses; upon which it was registered.

The execution of the deed from Garret and wife was proved by a subscribing witness, before the late Judge *Seawell*, who ordered it to be registered as the deed of Garret; and, reciting that Ann, the wife, resided in the state of Maryland, he also ordered the clerk of New Hanover county court to issue a commission to two or more fit persons in Maryland, to take her privy examination touching the execution of the deed by her. The commission was issued, and on it the privy examination was taken in the usual form, and returned, and thereupon it was ordered to be registered.

The defendant further gave in evidence a deed for the premises from the said Potter to himself, dated December 4th, 1828; and also read a deposition of a witness living in Philadelphia, taken by the plaintiff, stating that a young man was admitted into the almshouse of that city and died in October, 1841, who gave as his name William Henry Pierce, and stated that he was of Maryland and of the age of 25 years.

The plaintiff then gave further evidence, that the said Samuel Potter, in 1815, administered on the estate of Golden with the will annexed, and about two years afterwards married his widow.

The court instructed the jury, that the deeds from Garret and wife, and Pierce and wife, were both ineffectual to pass the title of the respective *femes*.

The counsel for the defendant then moved the court to instruct the jury that the deed from Peter Pierce conveyed the premises during his life, and, therefore, that the plaintiff could not recover in respect to the share of the lot, which was vested in his wife when the deed was made. But the

court declined to give the instruction as prayed; and instructed the jury, that if the said Sarah was one of the heirs of the said Golden, and she and her husband were seized of her share of the premises at any time during the coverture, the husband became tenant by the curtesy, and the plaintiff could not recover in respect of that share, and that, if no person was in the adverse possession of the premises, the actual seizin was, by operation of law, constructively in the said Pierce and wife. But the court further stated to the jury, that, if they should be of opinion, that the said Potter claimed the premises by virtue of his marriage with Golden's widow and of the deed from Garret and wife, and thence infer that Potter was in the actual possession of the premises at the marriage of Pierce and wife, and thence up to the time the said deed was made by the said Peter, then there would be no such seizin of the premises as would make him tenant by the curtesy, and the plaintiff ought to recover.

The counsel for the defendant also prayed for an instruction, that there was no evidence of the death of the sister of Golden, who was the grandmother of the lessor of the plaintiff; and therefore that the plaintiff could not recover. Thereupon the court directed the jury, that, if the grandmother was still living, the plaintiff could not recover; but stated further that there was evidence on which the jury might find, that she was dead before this suit was brought, if it should satisfy them that such was the fact.

The counsel for the defendant also prayed the court to instruct the jury, that, as the lessor of the plaintiff was not entitled to the whole of the premises, but, at most, only to a share as tenant in common with others, the plaintiff ought not to recover more than in respect to such share. But the court refused, and told the jury, that, if the plaintiff was entitled to recover at all, he was entitled to recover the whole lot, as the defendant failed to show,

that he was a tenant in common with the lessor of the plaintiff.

The jury found the defendant guilty as to the whole of the premises, and from the judgment accordingly he appealed.

*Strange* for the plaintiff, cited the following authorities: Roper on Husband and Wife, 7; *Doe* v. *Hutton*, 3 Bos. & Pull., 643; Crabb's Law of Real Property, 1079; Co. Lit., 29; *Sterling* v. *Penlington*, 7 Vin. Abr., 150, plead. 11; Crabb's Law of Real Property, 2302 and 2316; *Hatch* v. *Thompson*, 3 Dev., 411; *Branson* v. *Poynter*, 4 Dev. & Bat., 393; *Holdfast* v. *Shepherd*, 6 Ire., 361; *Green* v. *Branton*, 1 Dev. Eq., 500; *Burges et al.* v. *Wilson*, 2 Dev., 306; *Barfield* v. *Combs*, 4 Dev., 514; *Fenner* v. *Jasper*, 1 Dev. & Bat., 34; *Lucas* v. *Cobb*, 1 Dev. & Bat., 228; *Sutton* v. *Sutton*, 1 Dev. & Bat., 582; *Gilchrist* v. *Buie*, 1 Dev. & Bat. Eq., 346; *Askew* v. *Daniel*, 5 Ire., Eq., 321; *Ives* v. *Sawyer*, 4 Dev. & Bat., 51; *Jones* v. *Lewis*, 8 Ire., 70.

*W. H. Haywood*, for the defendant.

RUFFIN, C. J. Upon the plaintiff's own evidence his lessor was, at the trial, a tenant in common with her aunt, Ann Pierce, and also, at the date of the demise, with her brother, William Henry, then living; and therefore the Court holds it erroneous to say, that the plaintiff was *entitled* to recover the whole lot. It is true, that a general mode of declaring upon a demise of a tenant in common for the whole has been tolerated, and upon it a recovery for the share allowed. It has been also held not to be necessary, that, in such a case, the verdict should find the precise share, to which the lessor of the plaintiff was entitled; but that it may find the defendant guilty in general terms and then leave the party to take possession at the

risk, should he take more than belongs to him, of being answerable therefor to the action of the other party, and also liable to a summary order of the court for restoration of possession. But it is not the absolute right of the plaintiff to have such a verdict. The jury may find according to the title; and, when the extent of it can be seen with reasonable certainty, it is recommended as the more correct, and it is usual, to set forth in the verdict the undivided share, to which the title appeared, and to enter the judgment accordingly. *Godfrey* v. *Cartwright*, 4 Dev., 487; Arch Forms, 380; *Lenoir* v. *South*, 9 Ire., 237; *McArthur* v. *Porter*, 6 Peters, 205. By that method questions are settled at once, which might otherwise produce troublesome controversy in other forms. The propriety of that course is more particularly exhibited in an action by one of the tenants in common against another; in which case it is clear, the plaintiff cannot be entitled to a verdict in such a form, as would enable him to take judgment and execution authorizing him, on their face, to turn the co-tenant out of the whole. That was admitted at the bar to be proper in the case last supposed. But it was argued and it seems to have been the ground of the decision below, that it is otherwise, when the parties are not tenants in common, as was supposed to be the fact in this case. It was not, indeed, the fact, since, as will be presently mentioned, the defendant has the title of Mrs. Garret, at least. But if it were true, it could make no difference. For the question is not, what the tenant has the right to hold; but it is, what part the plaintiff has a right to recover. Now, that is what the lessor of the plaintiff had a right to demise; namely, the undivided share, and no more. For, although the demise laid is for the whole, the very point of the dispute is, whether the lessor could make such a demise, or, if not, for any and what part; and the recovery must be for the share the lessor might rightfully have demised. For, tenants in common have several titles, and

therefore each of them had to bring his several assize against a disseizor, as he was obliged to count truly on his title, and the recovery of one could not be for more than he demanded or could legally demand. Hence, necessarily, under the judgment, he entered into his share only and became seized with the disseizor. In like manner, no more can be rightfully recovered in ejectment, even against a wrong-doer, than the share of the plaintiff's lessor; for, the demise of a tenant in common, whether in the form of a lease for the whole, or for a share, is really effectual for the share only, and, by a necessary consequence, the law cannot adjudge to a plaintiff more than the right, thus derived from the lessor, invests him with. The jury might, according to the modern practice, have omitted to find the quantum of interest of the lessor, which would have left that to be determined in proceedings consequent upon the plaintiff's taking possession of too much—since that course seems to be established. But that will not *entitle* the plaintiff to call on the jury to go further than to say, he has some interest in the land, and, agreeably to the direction here, require them to find expressly, that the defendant was guilty as to the whole premises, when the lessor's title, and, of course, his lease, is for less. For, against an affirmative verdict, that the plaintiff was entitled to the whole or to a certain part of the premises and a judgment accordingly, the court would not be at liberty, in a summary way, to re-examine the title and control the execution of the writ of possession, or in an action for the *mesne* profits limit the amount of damages to the true interest of the lessor of the plaintiff, as was done in *Holdfast* v. *Shepard*, 9 Ire., 222.

Although the decision of the foregoing point disposes of the case in this Court, yet it is deemed proper to consider of the others, as most or all of them will probably arise on another trial.

Then, in the next place, the Court holds, that the deed from Garret and wife was duly executed to pass her inheritance. The objection urged against it is, that the *feme* was a resident in Maryland, and her examination and acknowledgment were then taken on a commission from the court of this state; whereas, it is alleged, a commission only goes when the woman is a resident of another "county" in this state, and the deed ought to have been acknowledged before a judge in Maryland, or under a commission from some court of record in that state. But the objection is in no part tenable. The act of 1751 directed a commission from the court of the county in which the land lies, when the wife is a resident of any other "country." By a misprint the word is changed in the Revised Statutes of 1836 to "county." But that cannot affect this case, because this proceeding was in 1817 under the act of 1751. But, if it had been after 1836, the Court would still hold the deed good; for the change from "country" to "county" does not alter the sense of the act. In the next section the act retains the form of the commission given in 1751, and the words of it are, that the wife "is not an inhabitant of our said state." Indeed, upon referring to the manuscript original in the secretary's office, the word appears to be "country." It is therefore clear, that, in respect to residence merely, the act does not intend to form a commission on its being in the same county in which the land lies or in a different county in this state; but that it is to go, only when the maker of the deed lives out of the state. The other branch of the objection, that the deed ought to have been acknowledged before a judicial officer of Maryland, is also mistaken. The act of 1810, which authorizes that course, is cumulative. It has never been supposed to supersede that of 1751; but either method has been practised, as it suited the convenience of parties. The act of 1836,

indeed, preserves in it both the act of 1751 and that of 1810—thus clearly giving an election between them.

With respect to the deed from Pierce and wife, the facts do not appear with sufficient distinctness, to authorize the Court to form a satisfactory or positive opinion. But, as they are supposed to be, the Court would concur in holding it ineffectual as the deed of the wife, for want of a due acknowledgment and privy examination. The entry of record, appointing McColl and Jones to take the examination, does not state, that the deed had been then proved, and it cannot be collected from the certificate of probate that it had been. The inference is rather to the contrary; for, according to the copy set forth in the case, the certificate of probate is on the commission, and therefore creates a presumption, that McColl proved the deed, when he returned the commission. If so, it would be wrong, as the act allows the commission to be ordered, only when the deed has been already executed and acknowledged by the husband or proved. But, secondly, there was no order for a commission, and the act expressly requires such an order. Indeed, upon the face of the papers it would rather seem, that, with or without proof of the execution, McColl and Jones were, as members of the court, appointed to take the privy examination of the woman, as being within the verge of the court. If that be the fact, the proceeding is likewise wrong, because that can only be done, when the deed has been personally acknowledged in court by the husband and wife; in which case, consequently, the wife is examined only, whether she doth voluntarily assent thereto. It was held in *Burgess* v. *Wilson*, 2 Dev., 306, that the two methods are substantially different, and that each must be observed in its appropriate case. Indeed, the counsel here seemed to yield this point; and therefore the Court supposes the statement is not more precise.

But, supposing that deed not to be good as to the inheritance, there is still the question, whether the plaintiff can recover during the life of Peter Pierce, the husband. There lacks nothing to complete his title, as tenant by the curtesy, unless it be a seizin during the coverture. That person says, that neither he nor his wife ever had possession of the premises. But that must mean merely, that they did not in fact occupy, nor have perception of any profits; and he cannot be supposed to swear, that he was not in possession by operation of law. Upon that point we concur with his Honor, conceiving it to be perfectly settled in our law, that, when no other person holds, the possession is constructively in the owner. The husband and wife are in, as to all the world besides themselves, and there seems to be no reason, why they should not be so deemed as between themselves. If the husband allow another person to be in possession, whereby the wife's estate may be prejudiced, he is justly excluded from the estate, which would enure to him if he had done his duty by evicting the wrong-doer. But when the land is wild, for example, the husband is not bound to improve it, nor go through the frivolous formality of once setting his foot on it, in order to acquire his estate by the curtesy. However it may be elsewhere, there have been so many cases in this state, in which the owner of land, not occupied by any other person, has been held to have the rights and remedies of an actual possessor, that it cannot be called in question now. Then, had Pierce and wife such a possession during the marriage? The contrary is suggested, only by reason that Potter claimed the land and had taken possession of it before the marriage. But he did not marry until two years after Golden's death, that is, some time in 1817, and Garret's deed was made in October of that year; whereas Pierce was married in August, 1816, and there was thus a clear interval of several months, in which it cannot be imagined that Potter

had entered, and the possession was in Pierce and wife. But, as the Court conceives, there was no evidence on which it could be found, that Potter ever took possession in fact, or that, up to the time of his deed to the defendant, he had any other possession than the rightful one implied by law to be in him, as the owner of shares in the lot under his purchases. It may be conjectured, that he would exercise acts of ownership over the premises, if he lived near them. But there is nothing, which the law can deem evidence of it, proper to be left to the jury. He derived no title to the premises through his wife; for she took no interest in them under the will and she did not dissent. And the law can never allow the presumption, that one took possession of land as a mere trespasser, upon a bare possibility, that he may have set up an unfounded claim to some interest in it and without any proof to the fact itself. It was taken for granted, that Mrs. Potter claimed the premises under the general disposition in the will of all the real estate for her life. But that is begging the question, and is contrary to both a natural and legal presumption; for, as the premises were subsequently purchased by the testator and did not pass by the will, the hypothesis, that the widow, nevertheless, claimed and took possession of them is entirely inadmissible, without evidence to the fact; of which the case states none was given here as to any period prior to 1828. Indeed it does not appear, that there was a house or a fence on the lot, or that any person occupied it. The Court therefore holds it to have been erroneous to submit the question of a possession by Potter to the jury, upon the evidence given.

Supposing, however, that upon the next trial it should appear, that Mrs. Golden claimed the premises for life and actually held them upon such claim from Golden's death, then we should hold, that no estate arose to the

husband, Pierce; and the title of the lessor would depend on the sufficiency of her mother's deed: of which all has been already said, which the statement before us will allow. If that should turn out to be insufficient, the lessor of the plaintiff will be entitled to one-sixteenth of the premises, according to the statement of the family before us. For, Golden's will shows that he left two brothers and their families, and a sister, Ann Garret, and another sister or her two daughters, one of whom was the mother of the lessor of the plaintiff. Therefore the premises would be divisible, first, into four shares; and, next, one of them would be again divided between Sarah and Ann Fleming, in case their mother was dead, and the lessor of the plaintiff would be entitled to one-half of Sarah's eight, or one-sixteenth. The other sixteenth may belong to her now, but it did not on the day of the demise, but was then vested in her brother, William Henry, who died in 1841. Upon the question, whether the grandmother of the lessor of the plaintiff was dead or living, there was evidence, and strong evidence to be left to the jury. The circumstances, that Golden does not notice her in his will, while he provides for her children; that no account is given of her since 1808, although her son-in-law was examined on the trial, and that Potter purchased from one of her children; all tend to raise a presumption of her death long ago. It is true his Honor stated inaccurately, that the plaintiff might recover, if she died before this suit was brought; for, to have that effect her death must have occurred before the defendant's title was perfected by the statute of limitations. But the position was laid down in reference to the instruction prayed; which did not relate to the period of that person's death, but insisted, on the contrary, that she was then living; and, thus restricted, it was correct.

PER CURIAM. Judgment reversed and a *venire de novo*.

DEN ON DEMISE OF JAMES L. BATTLE, et al. v. JOHN F. SPEIGHT.

Whether a republication of a will can be proved by parol evidence of the declarations of the testator, merely, is matter of great doubt.

At all events the evidence should shew a clear determination on the part of the testator to republish.

Appeal from the Superior Court of Law of EDGECOMBE County, at the Fall Term, 1849, his Honor, Judge *Battle*, presiding.

After the decision of this case at December term, 1848, (see 9th Ired., 288,) it came on for trial a second time, when the following facts were agreed: That Louis D. Wilson, then of the town of Tarborough, made his will in these words: "In the name of God: Amen. I, Louis D. Wilson do, this 26th day of May, 1833, make this my last will and testament. First: I give to my sister Mary, the sum of five hundred dollars. Secondly, I lend to my sister Nancy, the land and plantation inherited from my father and all my negroes; and after the death of my sister Nancy, to her surviving children equally. Thirdly, I give to the chairman of the county court of Edgecombe and his successors in office the residue of my estate, both real and personal, for the use and benefit of the poor (the paupers) of said county, to be appropriated and managed under the supervision of the justices of the county. Fourthly, I give my town lots, Nos. 27 and 28, to Eliza Cotton, now Eliza Thompson." And that the paper was written and signed by the testator; and, after his death, was duly proved in November, 1847, as his will, passing both personal and real estate; that the testator's sisters,

Mary and Nancy, and Eliza Thompson, died several years before 1847, and that the testator knew that they were dead; that the testator, having become an officer in the army of the United States destined for Mexico, was, in the month of July, 1847, making arrangements preparatory to his departure on the next day, and was at his own house in Tarborough, looking over a large collection of miscellaneous papers, spread out before him; and that, whilst he was so engaged, a gentleman called on him, but the testator continued his examination of the papers, and in the midst of it, on taking up one of the papers, the testator made a slight exclamation, which attracted the attention of the visitor, and then the testator read the paper silently, and threw it to the visitor without offering a word, but proceeded in the examination of his papers; that the visitor silently read the paper (which was the will above set forth) and said to the testator: "Is this the only will you have?" and the testator replied, "That's all, sir;" whereupon the visitor handed back the paper and said to the testator, "All the persons to whom you have given property are dead," and the testator rejoined, "Yes;" and nothing more was then said on the subject; that, on the morning of the next day, the testator said to several persons, that he had been so busy that he had not had time to write his will, and asked one of them whether a will made in Mexico would be valid, and it was concluded that it would be; that, in the evening of that day, the testator departed and went to Rocky Mount, in order to take the railroad for Wilmington on his way to Mexico; and that, upon getting to Rocky Mount, the testator remarked to a friend that he had been writing almost incessantly during the week past, and yet had not written the most important document; and, on the succeeding morning, the testator mentioned to the same friend, that he had not written the document, but he would do so as soon as he should get to Mexico—not

saying at either time, what kind of document it was, to which he alluded: that on that day the testator proceeded on his journey and soon sailed for Vera Cruz, and that he was taken very sick on the voyage and died within a few days after he landed.

The premises mentioned in the declaration are the lots in Tarborough devised to Eliza Thompson, and a tract of land, which the testator bought, between the years 1833 and 1847; and the lessors of the plaintiff are the testator's heirs-at-law.

It was agreed, that, if, in the opinion of the court, the foregoing facts and conversations did not amount in law to a second republication of the said will in the year 1847, there should be a judgment for the plaintiff for all the premises; and if the court should be of opinion that they did amount to such republication, then there should be a judgment for the plaintiff or the defendant, for such parts of the premises, as the court should think them respectively entitled to.

The court held, that there had been no republication of the will and gave judgment on the case agreed for the plaintiff for all the premises; and the defendant appealed.

*B. F. Moore*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. The return of this case has presented to the attention of the Court a second time the question, whether the republication of a dated holograph will, lodged and found as prescribed in the act of 1874, can be established, by parol proof of declarations, merely, of the testator. It has received much consideration, and it is owned, that the more it has been reflected on, the more questionable the affirmation of the proposition seems to be. Republication makes a will operate from the period of the republication, as if it had been then executed; so as, for example, to pass land acquired between the original

execution and the republication. Then, to allow of a republication by verbal declaration simply is, in effect, to give another date to the instrument, so as, by means of parol evidence of such declarations, to make it pass land acquired up to such new date, or, in other words, to render it to that extent a different instrument from what it purports on its face to be. It may be, that, from necessity, such evidence of a publication or republication of wills of this kind must be competent, in order to show that the party deceased was treating it as his completed will. But it is, obviously, dangerous evidence, and it may defeat the policy of the acts, in requiring something more than words to constitute either a publication or a revocation of a will. The Court, however, declines deciding the point, choosing to leave it open to discussion whenever it shall be essential to rights in controversy. It is not so in t e present case; for, if evidence of this kind be competent at all, it is clear that the declarations of this testator fall short of showing the slightest intention to publish this paper as a will of July, 1847, as contradistinguished from one of May 26th, 1833. There is not a single expression among those proved, which tends to establish any purpose of republication. On the other hand, everything he said tends to the contrary; and it appears plainly that he was dissatisfied with it, as a will, in the state of things then existing, and meant to make another. He could not, therefore, have intended then to republish this paper; and, although, by virtue of the act against parol revocations, it remained in force, notwithstanding the testator's dissatisfaction, yet his expressed wish and design to make another will furnishes a conclusive argument against the supposition, that this will was intended to be republished. The premises sued for descended, therefore, to the heirs-at-law, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

SAMUEL PANNELL v. HENRY G. HAMPTON.

In an action of replevin, under our statute, Rev. Stat., ch. 191, if the plaintiff be nonsuited, the defendant cannot have a judgment for damages assessed by the jury, but only a judgment for the thing replevied and costs.

At common law in such a case the judgment was for the return merely.

Appeal from the Superior Court of Law of SURRY County, at the Spring Term, 1849, his Honor, Judge *Ellis*, presiding.

This is replevin for a slave, who was delivered to the plaintiff. The defendant avowed the taking, as sheriff, by virtue of a writ of *fieri facias* on a judgment in favor of one Brooks against one Stuart. On the trial, the plaintiff offered to show the title in himself, as trustee in a settlement to the separate use of Stuart's wife for life, and then for her children, and that the defendant knew it, when he seized the slave. But the court rejected the evidence as irrelevant; because, if true, it would not enable the plaintiff to maintain replevin against the sheriff; and the plaintiff was nonsuited. Thereupon the court directed the jury to ascertain the damages, sustained by the defendant by being deprived of the slave. The defendant gave evidence, that the plaintiff carried the slave to Virginia as soon as he got the possession, and yet kept him there. The court then instructed the jury to assess the damages to the value of the slave, and a reasonable hire from the time he had been replevied: and the jury assessed the damages accordingly to $635, and judgment was rendered for the penalty of the replevin bond, given by the plaintiff and his sureties, to

be discharged by the payment of those bonds and the costs; and the plaintiff appealed.

No counsel for the plaintiff.

*Morehead* and *Iredell*, for the defendant.

RUFFIN, C. J. The judgment is erroneous; being rendered neither according to the common law, nor the statute. At common law the judgment in replevin, upon a verdict for the defendant, is, that he have a return of the goods, to be held by him irrepleviable; and upon a nonsuit, it is for the return merely. Blk. Com., 149; 1 Arch. Pr., 83. It was by St. 7 Hen. 8, ch. 4, and Hen. 8, ch. 19, that avowants and other defendants, in certain actions of replevin, were allowed to recover damages, after a verdict or a nonsuit, to be assessed or inquired of by a jury at the prayer of the defendant. 2 Sellon's Pr., 269, 271; Arch. Forms, 426–7. The judgment is for the return of the goods, and for the damages and costs. Now, our act, after prescribing what judgment the plaintiff in replevin shall have, when the slave is delivered to him or kept by the defendant, proceeds to enact what shall be done when the slave is delivered to the plaintiff and there is a verdict for the defendant, namely, that the damages, sustained by the defendant by being deprived of his property, shall be ascertained upon an issue, and that judgment shall be rendered against the plaintiff and his sureties for the amount of the bond given by them, to be discharged upon the payment of the damages assessed and costs. Rev. Stat., ch. 101, s. 6. It omits the provisions contained in the English statutes for an assessment of damages, when there is a nonsuit. Whether, when there is a verdict, the damages are to include the value of the slave, as well as the loss from being deprived of the possession of the property, or the judgment is still to be for a return and for the damages, restricted to those arising from the

change of possession, may, possibly, admit of some doubt, as the act is expressed. One would certainly expect, indeed, that the defendant would be entitled to the return of the slave, especially if he desired it. The point has not been before this Court, and we are not informed of the construction placed on that part of the act on the circuits, until the present case. The court does not propose to decide it, as it does not affect this case. If, however, the rule laid down to the jury be correct, it would seem highly probable, that the omission to provide for a case of nonsuit was of purpose; as this case shows there might be good reasons for the distinction. For it would be an exceedingly great hardship upon the plaintiff, to be conclusively bound to pay the value of the slave and his hire, or at least, the debt in the execution, if less than such value, merely for a mistake in the form of the action brought by him. If a verdict be rendered for the defendant, it may be assumed that he has established the slave to be "his property." But this nonsuit was ordered, simply because the sheriff was not liable to be sued in replevin, and the presumption rather is, that the plaintiff would have shown the property to be his, if the court could have heard his evidence. At all events, the title stands indifferent: and in that state of the case it may well be, that the legislature meant the plaintiff should not be absolutely bound to pay the value of the negro, that is, the utmost, which would have been recovered from him, if there had been a verdict against him on the title. It certainly is more just, that the judgment should be for the return of the slave, as at common law; and after that shall be done the parties will then be at large again, to assert and defend their respective titles to the slave in detinue, or such other actions, as may be proper to bring the matter to a decision on the merits. But, whether the omission of a provision in the act for a nonsuit was by design or oversight, it certainly exists; and

therefore in such a case there cannot be judgment for damages, but only for a return and the costs. If the slave should not be returned in obedience to the judgment, the defendant will have redress on the replevin bond, which is payable to himself; and if he should be returned, he will then be held or disposed of by the defendant, as if he had not been replevied.

The judgment must be reversed with costs in this Court, and a judgment entered, as at common law, for the return of the slave and the costs in the superior court.

PER CURIAM. Judgment reversed and judgment for defendant.

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DEN ON DEMISE OF REDIN RAIFORD v. NEWETT PEDEN.

Under an execution to sell the lands *descended* from A. to B., the sheriff has no authority to sell lands *devised* by A. to B. and such sale will be void.

Where A., having several tracts of land, devises one tract in fee to B. who is one of his heirs, and another tract in fee to C. another heir, each takes by devise and not by descent.

Appeal from the Superior Court of Law of JOHNSTON County, at the Fall Term, 1849, his Honor, Judge *Battle*, presiding.

This was an action of ejectment for a tract of land of which it was admitted that the defendant was in possession. The plaintiff's lessor proved, that Ralph Massey died in the year 1836, having been twenty-one years in possession of the lands, now in controversy, and that he

left surviving him his heirs-at-law two daughters, Celia and Olive, of whom the former married William Peden. He also left a last will, which was after his death admitted to probate. The lessor then proved a writ of *scire facias* against the heirs and devisees of the said Ralph Massey, deceased, a judgment thereon, a writ of execution to the sheriff, his levy and sale made thereupon and his deed to the lessor for the lands, now sued for, copies of all which are sent up as part of this case. To show that the plaintiff claimed under Celia, one of the heirs-at-law and devisees of Ralph Massey, the plaintiff's lessor then proved a deed from William Peden and wife to the defendant.

It did not appear, either way, whether Ralph Massey had any other lands than those mentioned in his will or not.

The defendant contended, that the said deed was not in fact executed, within two years after the death of the said Ralph Massey; and that the writ of execution, under which the plaintiff's lessor purchased, did not authorize the sale of the land now in controversy, inasmuch as it commanded the sheriff to sell the lands of Ralph Massey, "descended" to his heirs, whereas the land sold did not descend but was *devised* to Celia, one of the daughters of the said Ralph Massey and wife of William Peden.

The court, being of opinion that the writ of execution under which the lands were sold, did not authorize the sale, the plaintiff's lessor submitted to a nonsuit and appealed.

Copy of so much of the will as is necessary in this case:

"I give and bequeath to my daughter, Mary Futrell, the land and plantation, whereon she now lives, &c.

"I give and bequeath to my daughter, Celia, all the land and plantation I lent to my wife," &c.

The judgment and execution were against the lands "that *descended to William Peden and wife, Celia, Rai-*

*ford Lynch, and Wilkerson Futrell and wife, Mary, from Ralph Massey, deceased.*" The deed of the sheriff corresponded with the execution.

*J. H. Bryan* and *Busbee*, for the plaintiff.

*W. H. Haywood* and *G. W. Haywood*, for the defendant.

PEARSON, J. Under an execution, commanding him to sell, "the lands that *descended* to William Peden and wife, Celia, Raiford Lynch and Wilkerson Futrell and wife, Mary, from Ralph Massey deceased," the sheriff sold the land in controversy to the lessor of the plaintiff. Celia, the wife of William Peden, was a daughter and one of the heirs-at-law of said Massey, who disposed of all of his lands by his will and devised the land in controversy to the said Celia. His Honor was of opinion, that the execution did not authorize the sheriff to sell this land. The plaintiff submitted to a nonsuit. The sheriff had no power to sell. An execution authorizing him to sell one thing did not give him power to sell another; land devised cannot pass under the description of lands descended. It was insisted, that the late statute, which provides that a want of conformity, between an execution and the judgment upon which it issues, shall not vitiate, cures the defect in this case. The statute has no application, for the defect does not grow out of a variance between the execution and the judgment, but is the result of a want of power in the sheriff. The power to sell is conferred by the execution, and must be preserved: if it be exceeded, the act is a nullity, as to the excess; here there was power to sell the lands which had descended and the sheriff executed his authority by selling lands which were devised.

It was also urged, that as Mrs. Peden was one of the heirs of Massey and took an estate in fee simple by the devise, she took the same estate, that she would have

taken by descent, and therefore is, in law, considered as taking by descent. It is true, she takes the same estate as to the quantity of interest, but she takes a different estate as to the subject matter, and, to make the rule apply, there must be the same estate in the same land. This is fully set forth by the authorities. If there be two co-heirs and one tract of land is devised to one, and another tract to the other, they take by devise and not by descent, for under the devise each has an estate in severalty in the respective tracts; whereas, by descent, each would have had an undivided moiety in the whole. Sheph. Touchstone, 451. *Reading* v. *Raustrom*, 2 Ray., 827; Salkeld, 423.

PER CURIAM. Judgment for the defendant.

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THE STATE v. JACOB DOVE.

On the trial of an indictment for murder, where it is alleged for error that the court improperly overruled a challenge of the prisoner to one of the jurors, the record must shew for what cause the challenge was made; otherwise the Supreme Court cannot say whether there was error or not.

Where a juror, upon being challenged, swears that he has formed and expressed an opinion, but only upon rumor, but that he could do impartial justice, upon hearing the evidence in the case; *primd facie* the juror is competent; though in some cases the court or the triers may find otherwise.

Where a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness, consistent with his testimony on the trial.

Although an impeaching witness may be examined as to the general moral character of the witness impeached, and also as to his character for truth when on oath, and when not on oath, it is not necessary to put these questions in any particular order.

The cases of the *State* v. *Benton*, 2 Dev. & Bat., 196; *State* v. *Ellington*, 7 Ire., 61,; *State* v. *George*, 8 Ire., 324; and *State* v. *Boswell*, 2 Dev., 209, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

STATE v. DOVE.

The prisoner was indicted for murder. The case stated in the record is as follows: "In forming the jury, two persons were offered as jurors and challenged for cause: On being asked whether they had formed and expressed the opinion that the prisoner was guilty, they answered they had—whereupon they were asked by the court upon what ground they had formed that opinion, and they answered that it was formed from report. They were then asked by the court whether their opinion was so fixed and made up in their mind that they could not do impartial justice between the prisoner and the State; and each replied that it was not so fixed and made up as to prevent his doing justice between the prisoner and the State: They were then ordered to be tendered to the prisoner, and he challenged them peremptorily, and in like manner he challenged thirty-three others before a jury was formed."

One Stairns was examined as a witness for the State, and he testified to the facts of the murder and other circumstances. Evidence was given on the part of the prisoner, impeaching the general character of Stairns. On the part of the State, evidence was then offered that, on the evening after the homicide, and the next morning, he, Stairns, gave the same statement of the facts, as that he gave on the trial; and the court received the evidence, after objection for the prisoner.

On the part of the prisoner, it was then proposed further to prove, that Stairns was a man of bad moral character, and reputed to be dishonest; and, in order to do so, the counsel for the prisoner asked a witness (who had said that he knew the general character of Stairns) "what was his character for honesty;" and thereupon the presiding judge stated to the counsel that he understood the Supreme Court to have ruled that an impeaching witness, after stating his knowledge of the general character of the first witness, must then be examined, as to

his general character for truth when on oath, and when not on oath, and then as to his general character for honesty and morals, and his Honor required the counsel to put all those questions to the witness, but allowed him to do so in such order as he should choose. But the counsel declined to inquire as to the character of Stairns for truth when on oath, and therefore refused to examine the witness further.

The prisoner was convicted, and after sentence he appealed.

*Attorney General*, for the State.

*Boyden*, for the defendant.

RUFFIN, C. J. Strictly speaking, a *venire de novo* could not be awarded on the point respecting the jurors, had the decision on it been erroneous, inasmuch as the prisoner's exception does not state, that the challenge was made by him, nor assign any cause for it. In *Benton's* case, 2 Dev. & Bat., 196, although the juror said, he had made up and expressed an opinion as to the guilt or innocence of the prisoner, and although there was every inference, that it was unfavorable to the prisoner, from the fact that the prisoner, as here, afterwards challenged him peremptorily, yet the court was obliged to affirm the judgment, because it did not appear affirmatively that the opinion was adverse to the prisoner. As it stood indifferent upon the record, whether the opinion was for or against the prisoner, and as only that party can challenge, for the cause of an opinion formed and expressed, against whom such opinion is, the court could not say there was error in overruling the challenge, as that of the prisoner founded on that opinion, as the cause. So, here, if it be admitted, that the prisoner had cause of challenge, for that the jurors had formed and expressed the opinion, that he was guilty, yet if he did not challenge the jurors, or

did not challenge them for that cause, he cannot complain, that the court did not on his behalf set them aside In drawing exceptions counsel ought to recollect, that this Court cannot presume pleadings nor infer objections on the side of the appellant more than of the appellee, and that the *onus* is on the appellant to show that there was error: and, therefore, that every fact was directly stated on which the party relies to establish or exhibit the error. The exception ought to have set forth a narrative of the transaction as it occurred, by saying that the prisoner challenged the juror, and then setting forth the cause he assigned. As it is, there is no legal intendment of any particular cause, as the record merely states, that it was "for cause;" and, as none is stated, it is impossible for the Court to determine, whether that assigned was or was not sufficient in law.

But if the Court could supply that defect by supposing that the prisoner was the challenging party, and that his cause of challenge was, that the jurors had from rumor made up and expressed an opinion against him, the Court would still hold, as the cause is stated, that the superior court did not err in again tendering the juror to the prisoner. As was said in *Ellington's* case, 7 Ire., 61, such an opinion, formed from rumor—if opinion it can be called—would seem in its nature to be but hypothetical; that is, resting upon the supposition, that the facts should turn out to be on proof according to the rumor. Hence, when the juror is further asked, whether, if the proof should fail to show the truth to be as the matter had been reported against the prisoner, or show it to be different, his impression or opinion would in that case prevent him from doing impartial justice according to the evidence, the answer is a natural one for every man, who has honesty and sense enough to try anything, that he had no such opinion as could influence his mind to give a verdict contrary to or without evidence. Under such circum-

stances the juror must be deemed *prima facie* to be indifferent, and therefore we must suppose his Honor held him to be so in point of fact. We will not say, that upon some minds common fame may not make such impressions, that triers or the judge might find the person not to be indifferent. That would depend much on their estimate of his intelligence, temper, candor and general impartiality. But when he swears, that his mind is in an impartial state, and that it was never otherwise but upon rumors merely, and that he would not act on them independent of the evidence, there is, *prima facie*, we think, no just ground of exception to him as a juror.

In the *State* v. *George*, 8 Ire., 324, a previous statement, consistent with the testimony of a witness given on the trial, was deemed competent in support of his credit, when attacked by evidence that he had made inconsistent statements. It is argued, that it is different here, because the witness was impeached by evidence of bad character. But the force of such a distinction is not perceived. The evidence in question is, in its nature, but a feeble support of the credibility of the witness. But such as it is, it seems to be as good proof, that the testimony of the witness is true, when his veracity is attacked upon the score of bad character, as upon that of having told different tales about the matter.

Upon the other question of evidence, we suppose his Honor attended to the directions, which appeared to have been given by the presiding judge as to the mode of examining witnesses to general character, in *Boswell's* case, 2 Dev., 209. The judgment was affirmed in this Court; but it cannot be collected from the opinion of the Court, that it was deemed necessary or proper in every case to pursue the order of examination there set forth, or even that those questions should all be put in every case in any order.

But certainly they are very proper questions in themselves, and they may always be put by the one party or the other, and generally will be so put. Although the prisoner may not, perhaps, have been bound to go through that series of interrogatories, so as to make him ascertain, how far the witness was addicted to all the vices in the catalogue, but he might have come at once to that or those he meant to impute to the witness, yet it is not perceived that the prisoner received or could have received any prejudice, by reason that the whole examination would be conducted by his counsel. Since all the questions might be asked or were proper to be asked by the one or the other, it seems totally immaterial on which side they were propounded; and therefore no harm could have arisen to the prisoner from the course adopted, and the Court has no right to disturb the verdict.

PER CURIAM. Ordered to be certified accordingly.

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DANIEL FESTERMAN v. LEWIS PARKER.

The construction of a contract is a matter of law. When committed to writing, the meaning of the terms, when they are explicit, is a question for the court; but if doubtful and uncertain, they may be submitted to a jury with proper instructions. If the contract is verbal and the parties dispute about the terms, that is a matter of fact for the jury; but if there be no dispute about the terms, and they be precise and explicit, it is for the court to declare their effect.

If a contract to perform certain stipulated services, for a certain sum, is not rescinded by the mutual consent of the parties, then a promise to pay an additional sum for the same services is without consideration and cannot be enforced.

The case of *Massey* v. *Belisle*, 2 Ire., 176, cited and approved.

Appeal from the Superior Court of Law of ANSON County, at the Fall Term, 1848, his Honor, Judge *Pearson*, presiding.

FESTERMAN *v.* PARKER.

This was an action of assumpsit. The plaintiff declared specially, and for work and labor done, and materials furnished, goods, wares, and merchandise sold and delivered, and for money paid to the use of the defendant.

The plaintiff proved, that, in the spring of 1844, he contracted to construct and put into operation a saw-mill, in a mill house of the defendant. The plaintiff was to do the work and find all the irons. The defendant, in consideration thereof, was to pay the plaintiff the sum of $100, and to board him and his hands and find the timber. The defendant, at the time of the contract, advanced to the plaintiff $2, to buy a saw and other articles, which the plaintiff was to furnish. The $20 was to be a part of the $100.

Shortly after this, and before the plaintiff had commenced the work, the defendant sent word to the plaintiff, by one Kennedy, that he wished to know, why he did not come and begin the work? The plaintiff sent back word to the defendant, that he would not build the mill upon the terms agreed on, that the price was too low. The defendant thereupon sent a message to the plaintiff, by Kennedy, "Tell him to come and do the work, I will do what is right or pay what is right"—the witness did not recollect which word, "do" or "pay," was used. The plaintiff soon after went and constructed the saw-mill and put it in operation. The plaintiff offered evidence to shew, that the materials furnished by him, (viz., the mill irons,) and the work done by him, if done in workmanlike manner, at the usual rates of workmen's charges, was worth $150. The defendant offered evidence, tending to shew that the work was, in several particulars, defective and insufficient—for instance, that the water gate was so badly fixed, that a fence rail had to be used to push it up and down, where the water was to be let on or stopped—that the carriage was made to run by ropes instead of having cogs in the usual way—that after try-

ing the mill some time, he got another workman to come and fix it, by putting in a new carriage with cogs, making a new gate, &c., for which he paid $30—that a good deal of the timber was spoiled by the plaintiff, and other timber was got by the second workman.

The defendant proved payments and set-offs to the amount of $100.

The court charged that upon the first count, on the special contract, the plaintiff could not recover, if the defendant had proved payments and set-offs, to the amount of the price agreed upon, viz., $100, supposing the work to have been well done.

Upon the second count, on a promise to pay for the materials furnished and work done, implied from the defendant's having made use of the materials and work, the court charged, that when work is not done according to contract, although the party cannot recover on the contract, still he may recover for the materials and work: but the amount cannot be greater than the original price, and the rate was, if the materials and work, well done according to contract, be worth $100, how much less is the value of the materials and work as actually done, and the plaintiff would be entitled to recover the amount so ascertained with reference to the original price. So the plaintiff could not recover, if the payment and set-offs had been proven to the amount of $100.

Upon the other view presented by the plaintiff's counsel, the court charged, that, if the original contract had been rescinded by mutual consent, so that neither was any ways bound, and the defendant had promised to do what was right or pay what was right for the materials and work, then the plaintiff would be entitled to recover the value therefor, which he insisted was $150. But the court was of opinion, there was no evidence to shew that the original contract had been rescinded by mutual con-

sent, so that neither was anyways bound, and another contract substituted as contended by the plaintiff.

On the contrary, the evidence tended to shew, that the plaintiff, having received $20, and being slow to begin the work, because he thought the price too low, the defendant, to induce him to begin, promised to "do and pay what was right," and if, by this, he was to be understood, as making an additional promise to pay more than the price agreed on, it was not binding for want of a consideration. If a man agrees to do work for me at the price of $100, and, afterwards before he begins the work, I promise to pay an additional sum of $50, if he will do the work, there is no consideration for the latter promise. The jury returned a verdict for the defendant—rule for a new trial for error in the charge refused, and the plaintiff appealed.

*Strange*, for the plaintiff.
*Hargrave*, for the defendant.

NASH, J. In the argument of the case here, the first exception taken by the plaintiff's counsel to the judge's charge is, that it ought to have been submitted to the jury to decide, whether or not the first contract was rescinded by the parties. His Honor instructed the jury there was no evidence, that the original contract had been rescinded and another substituted. There can be no doubt, but that the construction of a contract is a matter of law. If committed to writing, the meaning of the terms, where they are explicit, is a question for the court; but if doubtful and uncertain, they may be submitted to the jury, with proper instructions given hypothetically, as the case might be, and in doing so, no error is committed, as has been declared by the Court this Term. And if verbal, and the parties dispute about the terms of the agreement, it involves a question of fact, as to the terms, to be decided

by the jury ; but if there is no dispute as to the terms, and *they* be precise and explicit, it is for the court to declare their effect. *Massey* v. *Belisle*, 2 Ire., 176. Here there is no dispute as to the terms, but only as to their effect. In considering the question, as one of law and not of fact, the judge below committed no error. This brings up the main question, so far as this case is concerned, viz., was the construction put upon the terms, used by the plaintiff and the defendant, correct in point of law ? The plaintiff had agreed to build a mill for the defendant, for the sum of $100, and had received in part payment, the sum of $20. Becoming dissatisfied with his contract, he sent the defendant word, that he could not do the work for that sum, to which the defendant replied, " Tell him to come and *do* the work, I will *do* what is right or *pay* what is right." *One* party to a contract cannot rescind it ; to do so there must be the action of both parties, showing an assent to it, for it is as much a contract to rescind one as to make one. If in this case the plaintiff had sent back the money, which had been paid to him, and the defendant had received it, or if the defendant had brought an action for it, the original contract would have been rescinded. There is nothing in the case to show, that either the plaintiff or the defendant had intended to set aside the first contract. The plaintiff found, upon reflection, that he had made a bad bargain and was desirous to improve it ; the defendant had made *his* calculations, and was willing to give the sum agreed on to have his mill built. Perhaps it was as much as the work was worth or as much as he was able to give. At any rate such was the contract between the parties ; the plaintiff was to build the mill and the defendant pay therefor $100. The first contract was not rescinded.

His Honor, having instructed the jury, that the contract was not rescinded, proceeded to charge them, as to the effect of the promise made by the defendant, if any was

made, by using the words, "do or pay what is right." If, by this, he was to be understood as making an additional promise to pay more than the price agreed on, it was not binding, "for want of a consideration." On the part of the plaintiff it is insisted that, although the first contract was not rescinded, yet the parties were at liberty to vary it. There is no doubt of this proposition; but it will be recollected that the variation of a contract is as much a matter of contract as the original agreement—it equally requires the concurrence of intention in the parties; it cannot be varied at the mere will and pleasure of either. But in what was the contract in this case varied? not in the work to be done; that was not altered in the slightest manner; the plaintiff came under no new obligation; he was to do the same work he had previously bound himself to do. It was varied, says the plaintiff, in this, that the defendant promised to give an additional fifty dollars, if he would build the mill. Let it be admitted that the defendant, under the circumstances, had, in so many words, promised the plaintiff that he would give him fifty dollars more, or one hundred and fifty dollars for building the mill, would that have been in law a valid promise? I concur in the opinion that it would not. A consideration is an essential ingredient to the legal existence of every simple contract. This consideration consists, as defined by Mr. Smith, in his treatise on contracts, p. 87, to be "any benefit to the person making the promise, or any loss, trouble or inconvenience to, or charge upon the person to whom it is made." The case states that the one hundred dollars, originally promised, had been paid by the defendant, and the controversy is for the fifty dollars under the alleged promise. What loss, trouble or inconvenience, or charge resulted to the plaintiff by his executing the work? He was bound to build the mill by his original contract, and he was to do and did nothing more. What benefit was to result to the defend-

ant by the promise to pay the additional fifty dollars? None whatever; he was to get from the plaintiff precisely the same quantum of work without it as with it. The promise, therefore, if made, was purely a "*nudum pactum*," not binding in law, however it may be so in honor and conscience. The enforcement of contracts, of the latter character, in the language of Lord DENMAN, in *Eastwood* v. *Kenyon*, 11 Ad. and El., 438, however plausibly recommended by "the desire to effect all conscientious engage ments, might be attended with mischievous consequences to society." The truth of this opinion might be illustrated by a variety of cases. One is furnished by that of *Harris* v. *Watson*, Peake, 72. There it was laid down by Lord KENYON, that a promise made by a captain of a ship, to one of his seamen, when the vessel was in extraordinary danger, to pay him an extra sum of money, as an inducement to extra exertion for her safety, was a void promise, because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise, except that which the seaman was bound to do before. The principle established or recognized in the case last cited, governs this; the plaintiff was bound to do the work and the defendant would get nothing from the new promise but what he was entitled to before he made it. If the words used by the defendant amounted to a promise, it is *nudum pactum*, as founded on no legal consideration, and his motive in using them is very obvious; it was to induce the plaintiff to do that, which, by his contract, he was already bound to do. In the argument, the counsel referred the court to two cases. One was 52d E. C. L. R., 361, *Pontifix* v. *Wilson*, and the other from 19th John., 205, *Wood* v. *Edwards*. We do not think either assists the plaintiff's case. In the first, the plaintiff had contracted to erect certain buildings for the defendant, who was to pay a stipulated

price, when they were delivered. When the buildings had progressed some time, the plaintiff refused to go on with the work, unless the defendant would give security for the payment of the money. "The whole dispute," says Chief Justice TINDAL, "as shown by the correspondence, was, whether the defendant would give security, which the plaintiff insisted on, *and had no right to insist on.*" The case in Johnson was, that the parties had entered into a contract, under seal, for the purchase and delivery of a certain quantity of coal, at a price agreed. After its execution, a new agreement was drawn up by the plaintiff, but unexecuted by him, and sent to the defendant for his approval. The defendant, by letter, expressed his willingness to alter the old agreement, and promised to execute the new one at some future time, but never did. The action was in assumpsit on the new agreement. The court decided, that the first agreement was not set aside, but was in force, and that the proposition of the defendant to execute the new one was not binding on him; as well on the ground of *want of consideration* as of mutuality. These cases sustain the view taken by the judge below, both as to the rescinding of the original contract, and the invalidity of the second, if made.

No exception is taken to his Honor's charge upon the first count in the plaintiff's declaration, nor to the second, as to the rule laid down by him as to the measure of damages.

PER CURIAM. Judgment affirmed.

JOHN WILLIAMS, Adm'r, &c. v. ETHERTON WILSON.

Where slaves were given to A. during her coverture with B. and put in their possession, and, after the death of B., C., his administrator, believing A. had a right, returned the possession to A., who claimed them as her own and retained the adverse possession for two years, and then conveyed them to C., as in his own right; *Held*, that after the termination of the bailment to A. and her delivery of the slaves to C., he was remitted to his original right, and held the slaves as administrator of B., and on the death of C., the administrator *de bonis non* of B., was entitled to recover the slaves.

The case of *Smart* v. *Smith*, 2 Dev., 358, cited and approved.

Appeal from the Superior Court of Law of BERTIE County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an action of detinue brought by the plaintiff as administrator *de bonis non* of Hezekiah Mizell, to recover a number of slaves. The slaves in question were, by one Judith Britton, given to Ann Mizell after her intermarriage with the said Hezekiah Mizell. The slaves went into the possession of Hezekiah Mizell, and so remained for several years until his death. He died in the year 1842, and administration on his estate was granted by the court of pleas and quarter sessions of Bertie, at August term, 1842, to his son West Mizell. West Mizell surrendered the slaves in question to the said Ann Mizell, supposing, as it was in evidence he declared, she had title to them after his father's death, and the whole of them except six, George, Hagar, Norfleet, Lewis, Cæsar and Lucinda, remained in her possession more than three years before her death, she claiming them as her property, and West Mizell, the administrator, admitting they were.

The following slaves, the said George, Hagar, Norfleet, Lewis, Cæsar and Lucinda, went into Mrs. Mizell's possession, and so continued for about two years, when she, to favor her son, delivered them to the said West, he admitting the property in them to be in her, who continued in possession of them up to the time of his death. Mrs. Mizell then took the negroes, died shortly afterwards, to-wit, within a few months thereafter, when they went into the possession of the defendant. There was a demand of these slaves by the plaintiff as the property of his intestate, and a refusal to deliver.

It was insisted by the plaintiff's counsel, that, although their right to recover any of the slaves, except those which were redelivered by Mrs. Mizell to her son, was barred by the statute of limitations, yet, as to those, the statute was not a bar.

His Honor instructed the jury, that, if they believed the evidence, the plaintiff's right to recover any of the slaves was barred.

Rule for a new trial; rule discharged, and appeal prayed and granted to the Supreme Court.

*W. N. H. Smith*, for the plaintiff.
*Bragg*, for the defendant.

PEARSON, J. The plaintiff seems to have conceded, that he could not recover the slaves, which were kept in possession by Mrs. Mizell; but he insisted, that he had a right to recover the slaves, that she put in the possession of her son, West Mizell. His Honor thought the plaintiff's right was barred as to all; and that the effect of the bailment was not merely to estop West Mizell from denying the title of his mother, while the bailment and the possession obtained under it continued, but that it had the further effect of making his possession her possession, and

of protecting it against his own better title, so as to divest it and pass a good title to her under the act of 1820.

We cannot concur in this conclusion. It carries the doctrine of estoppel beyond the reason upon which it is founded—to enforce the observance of good faith—and involves the absurdity of making one hold possession adverse to himself. It is enough, that he is not allowed to derive any advantage from the possession, which he acquired under the bailment. There is no reason why he should be prejudiced in the assertion of his title after the bailment was determined and the possession restored.

If one accepts a lease of his own land from a person in adverse possession, he is not at liberty to deny the title of his landlord during the continuance of the lease or of the possession obtained under it, but when the relation of the landlord and tenant ceases, he may assert his title. He cannot take benefit of the possession thus acquired, or claim to be remitted to his "more ancient and better title;" for accepting the lease was his own act and he is estopped thereby during its continuance. But after it is determined, he will not be prejudiced and may well assert his title. Coke on Lit., 47, *b*; *Smart* v. *Smith*, 258, 2 Dev.

PER CURIAM. Judgment reversed and a *venire de novo*.

ALLEN WHICKER v. SAMUEL ROBERTS.

In an action for an escape, if the defendant wishes to except, upon the ground of its being a penal action, that it is brought in the wrong county, he must make the objection by plea in abatement.

Where a prisoner confined for debt, escapes, the officer, in an action against him for the escape, can only excuse himself by shewing that he has not only made fresh pursuit, but also that he has actually recaptured the prisoner before suit brought. Without this, fresh pursuit will not excuse the officer, even though the prisoner die before the officer has it in his power, by due diligence, to recapture him.

In this state the defense of fresh pursuit and recapture need not be by plea, but may be made on the general issue.

The case of *Green* v. *Mangum*, 3 Mur., 39, cited and approved.

Appeal from the Superior Court of Law of STOKES County, at the Spring Term, 1849, his Honor, Judge *Pearson*, presiding.

This is debt for the escape of one Smith, who had been committed, as in execution, to the custody of the sheriff of Rockingham. It was brought in the superior court of Stokes on the 26th of February, 1846. The defendant pleaded and *nil debet*, a special plea, that the escape was on the 24th day of March, 1844, and without the knowledge of the sheriff and against his will, and that on the same day he made fresh and close pursuit after Smith in order to retake him, and continued such pursuit from thence until the said Smith died, which happened on the 26th of March, 1844, and before this suit was brought, and before the sheriff could retake him; and that, by reason of the death of said Smith, the sheriff was prevented from retaking him, the said Smith, as he otherwise would have done.

On the trial this was the case. The escape was negligent and in the early part of the night of March 24th, 1844. In about an hour afterwards it was discovered by the jailer and deputy sheriff, and they went that night with a posse in pursuit of Smith. They went directly to the residence of the sheriff, which was about fifteen miles from the jail, and gave him notice of the escape; and the sheriff immediately proceeded with them to Smith's house, which was about five miles further, and was reached by the party about day-break on the 25th of March. They did not find Smith at home, but were told by his family, that he had been there for a short time, and had set off for Georgia. The sheriff and his party, then consisting of 25 persons, watched the house that day and the next night, and also searched the neighborhood generally. On the morning of the 26th of March the sheriff left some persons on guard at Smith's and had others patrolling the neighborhood, and he went home to make preparations for going to Georgia in search of Smith; and he then received a message from Smith, that he was at his own house and wished to surrender. The sheriff, without delay, went to Smith's in order to retake him; but, upon his arrival, he found that Smith had just before committed suicide, and thereupon he left his body to be buried.

The counsel for the defendant moved for a nonsuit, on the ground that the action was improperly brought to Stokes and ought to have been in Rockingham. The court refused the motion. A verdict was then rendered for the plaintiff by consent, subject to be set aside and a nonsuit entered, if the court should be of opinion, that the facts stated amounted to fresh pursuit and excused the sheriff for not having the debtor in prison at the bringing of this action. The court afterwards directed a nonsuit, and the plaintiff appealed.

*Iredell*, for the plaintiff.

*Morehead*, for the defendant.

RUFFIN, C. J. If this be a suit on a penal statute, within the act of 1777, the objection ought to have been taken by plea in abatement, and not by a motion for a nonsuit. *Green* v. *Mangum*, 3 Murp., 39.

It is not easy at this day to trace, with entire satisfaction, the defense of retaking on fresh pursuit to its origin, and the reason on which it was admitted. It seems to have been thought at one time, that the pursuit must be actually fresh and close from the immediate period of the escape, so that the debtor might be said to have been at no time beyond the control of the jailer. Afterwards, proceeding on the same motion, it was urged, that, if the prisoner escaped into another county, the escape could not be purged by a retaking, because the sheriff's power to imprison did not extend beyond his own county, and, therefore, by getting out of it the debtor's escape became complete. But Lord COKE says, that, by one of those favorable constructions, which the judges always make on behalf of the administrators of justice, as far as the law will suffer, it was adjudged no escape, "because the sheriff did all he could and by his fresh suit hath retaken him before any action brought," *Boyton's* case, 3 Rep., 43. The substance of the defense, then, came to be considered as consisting in retaking before suit and a detention in custody afterwards, instead of the fiction, that, after a retaking in the sheriff's county, the debtor was deemed not to have been out of custody. No regard was had, as to the time or place of retaking, provided only it was before suit brought and the debtor was kept in custody thenceforward. The reason, why that should bar a subsequent action for the escape, it would appear, was, that, by such recaption and close custody thereon, the creditor has the benefit of his execution. It was intended as an encouragement to

the sheriff to use his best endeavors to recapture the debtor; and after the creditor had held out such encouragement by delaying to sue, and, by the consequent efforts of the sheriff, the creditor again got the benefit of his execution, the latter ought not to pursue the sheriff farther. But, whether that was the ground of the admission of the defense or not, it is perfectly certain, that it was recognized as a good defense from a very early period; and equally certain, that, to constitute it a retaking before writ sued was indispensable. It was not sufficient, that the sheriff made fresh pursuit in fact, and did all he could to retake the party. For, in *Ridgeway's* case, 3 Rep., 52, it is explicitly stated, that the creditor may have his action for the escape "before that the sheriff *can* retake him," who has escaped. If fresh pursuit would of itself do, the creditor's action would not arise until the sheriff had desisted from the pursuit. But that is clearly not so, but the action arose upon the escape, if brought. In favor of the officer he is allowed to purge the escape by a recaption before he is sued. But there must be such a recapture; for, in *Whiting* v. *Reynel*, Cro. Ja,. 657, the plea was fresh pursuit, and a recapture thereon before plea pleaded, and it was adjudged on demurrer to be bad, because, although the sheriff did his best, as admitted by the demurrer, he did not succeed in retaking the debtor before the plaintiff had brought his action. Therefore, there must always be an actual retaking. No exception has been adjudged or hinted at, as far as can be discovered. It is true, there is no case in which the prisoner appears to have died so soon, that the sheriff was unable, by reasonable diligence, to retake him alive. But, in *Chambers* v. *Jones*, 11 East., 405, the decision went on the principle, that he would be liable in such a case. The evidence was, that after an escape and return of the debtor (which is the same as a retaking) he escaped again, and died before the sheriff

retook him, though he took the body within the prison, yet the plaintiff had judgment, because the action was in law for the first escape, which is not excused unless the sheriff shows a retaking and a detention thereon down to the commencement of the action, or, instead of such detention, a legal discharge. Lord ELLENBOROUGH delivered the opinion of the court, after time taken for consideration; and it is evident, that all the cases and precedents were looked into on that occasion. Among the cases cited were those of *Whiting* v. *Reynell*, and *Meriton* v. *Briggs*, Ld. Ray., 39, with approbation. In the latter case it was contended, that where there is a retaking the first escape is purged, and that, if the party escape again, the action must be for that. But Lord HOLT held the contrary clearly, and said both were but one escape. Then, as the death of the debtor out of custody, after one recapture, and a second escape, did not in *Chambers* v. *Jones* purge the first escape, it would seem, that his death before any recapture cannot have that effect. To allow it any operation, would be opening a door for new and nice inquiries, calculated to relax the efforts of the ministers of the law to keep prisoners safely, and to diminish the security of creditors. For, we have no rule as to the length of the time the debtor is to live after escaping in order to charge or excuse the sheriff, or as to the degree of diligence the sheriff shall use, if we once depart from that degree, which proves successful by a retaking. Suppose a prisoner to escape and fly to a foreign country and a public enemy, there is no authority nor reason that the officer should not be liable It was his fault, that his prisoner got out of his custody, and it is his misfortune that he could not retake him; and he must abide the consequences. So it must be likewise, if the party die, while the escape continues. It is said, indeed, that his death is one of those events, which are called the acts of God, and that they hurt no one; and

that, therefore, the officer ought not to be required to produce the body. But that is a misapplication of the maxim, and it really turns the other way. For, from the time of the escape to that of the death, the creditor had a cause of action against the sheriff; and shall the act of God deprive him of it? Unless it does, he must be still entitled to recover.

No notice is taken of the form of the special plea, because we have no statute, like that of W. 3 requiring a retaking to be specially pleaded, and therefore, the defense was open on the general issue. But, in whatever manner it may be brought forward, it is substantially the same; and as there is no such precedent as a special plea, which does not allege an actual retaking, so the evidence on *nil debet* must show one.

The judgment must, consequently, be reversed, and judgment given for the plaintiff on the verdict.

PER CURIAM. Judgment for the plaintiff.

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ROBERT BROTHERS v. JOSEPH HURDLE.

A plaintiff, who has recovered in an action of ejectment, has no right to seize upon the produce of the land, which has been served before the writ of possession executed. His remedy is by an action for the *mesne* profits.

Appeal from the Superior Court of Law of GATES County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

BROTHERS *v.* HURDLE.

This was trover for a quantity of corn, fodder, peas and beans. The defendant admitted the conversion, and proved, that, in the fall of 1846, he recovered in ejectment of the plaintiff the land on which the articles were grown, and was put in possession by the sheriff; at which time, the corn and some part of the peas and beans were growing; the fodder had been pulled and stacked, and the balance of the peas and beans had been gathered and put into a crib on the premises. They were of the growth of the year 1846. The demise was laid in June, 1845.

The plaintiff offered to prove, that the land was his. This evidence was rejected, the court being of opinion, that the recovery in the ejectment was conclusive in this action as to the title.

Under the instructions of the court, the jury found for the plaintiff as to the value of the fodder, peas and beans that had been gathered. The defendant appealed.

*Jordan* and *A. Moore*, for the plaintiff.
*Heath* and *W. N. H. Smith*, for the defendant.

PEARSON, J. There is no error in the instructions. The corn, &c., which was attached to the land at the time the defendant was put in possession, passed with it and belonged to him. But the fodder, &c., which had been severed, although on the premises, did not pass with the land; for, it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages, by way of *mesne* profits. If the defendant had a right to take the specific articles, he would for the same reason be entitled to recover their value in trover against the plaintiff, or any one, to whom he might have sold them. The amount of which would be, when one, who has been evicted, regains possession, he may maintain trover against

every one who has bought a bushel of corn or a load of wood from the trespasser, at any time while he was in possession. This, especially in a country where there are no markets *overt*, would be inconvenient, and no person could safely buy of one, whose title admitted of question. The mere statement of the proposition shocks our notions of common sense and calls for an overpowering weight of authority to sustain it. There is no authority for it in our reports, the invariable practice having been to bring trespass for *mesne* profits and for damages, if there has been any destruction or injury to the freehold.

Trover for the specific articles, either against a trespasser or a third person, has never been attempted. Upon examination, it is found, that there is no authority for it anywhere.

Our attention has been called to a passage in the New York edition, 1846, of Adams on Ejectment, page 347, where it is said: "Crops will pass to the lessor, although severed at the time the writ of possession is executed, provided, the severance was after the date of the demise." This is an interpolation, and is not in any of the former editions. *Uppon* v. *Witherick*, 3 Bing., 51, is cited. We have examined that case—it does not sustain the position. That was a *motion* by a tenant, who held over after his term and was turned out by a writ of possession, for a rule, that the lessor pay over to him the value of some grass and oats, which he had severed recently before the writ was executed, alleging, that he was entitled to them as a way going crop and which the lessor had taken into possession. The court was clearly of opinion, that the motion was of the first impression; that, to entertain it, would offer inducements to tenants to hold over, and if the defendant had any claim to a way going crop, he might bring his action. The inference from this case, that crops would pass to the lessor after he regains possession, although severed at any time between the date of

the demise and the execution of the writ of possession, was hastily drawn and is not warranted by it.

The only other case cited, which has any bearing, is *Morgan* v. *Varick*, 8 Wendall, 587. That was an action of trespass for *mesne* profits and *de bonis asportatis*. The plaintiff, having been let into possession after a recovery in ejectment, brought the action against the defendant in ejectment, for *mesne* profits and for damages, for removing certain boilers of a steam engine, which had been used in a corn mill on the premises. The judge below held, that the plaintiff could recover *mesne* profits, but was not entitled to recover damages for removing the boilers. SAVAGE, C. J., delivers the opinion of the Court. It is not at all satisfactory upon the point of the case. The stress of the argument is spent upon a collateral question. The learned judge enters into a long discussion of the doctrine in one of the resolutions in *Lifford's* case, 11 Coke, 51, and succeeds in proving by argument and authority, that after the owner regains possession, he may maintain trespass for *mesne* profits and for damages for any injury to the freehold as well against third persons and strangers, who had come into possession, as against the original trespasser —against such occupant for the time he was in. The relevancy of this discussion is not clearly perceived—the defendant was the *original trespasser*, and not a stranger. The case turned upon the statute of limitations (6 years). The boilers were severed more than six years before the commencement of the action. They were removed from the premises at the request of the defendant *within six years*. If the severance had been within six years, it would have been "plain sailing" for the court; for *mesne* profits and damages would have covered it. Such, however, was not the fact. And ingenuity was taxed to prevent the statute from being a bar to a recovery for what the judge "calls a wanton injury, as the boilers were sold for one-fourth of their value." This could only be effected

by holding, that the boilers, after they were converted into personal property by severance, belonged as chattels to the plaintiff. Accordingly, after the long discussion, above alluded to, this conclusion is announced; but it is a mere assertion, and is not supported either by argument or authority.

In this case the articles sued for were of annual production; and my Lord COKE suggests a distinction between such things as corn, &c., which come by the act and operation of the party; "for, if he had not sowed the land, no corn would have been there," and such things as come by the act of God, as trees, &c. We do not, however, put the case upon this distinction. The true distinction is, where a tenant, or one having a particular estate, wrongfully severs a tree or other thing from the freehold, it becomes personal property and immediately belongs to the landlord or remainderman, who may punish the tenant for waste and may take the thing; or may presently bring trover against the tenant or any third person, who has converted it. For, as there is no possession adverse to him, the thing when severed immediately belongs to him as a chattel. Besides, he would otherwise be without remedy as he could not bring trespass *quare clausum*, the tenant being *rightfully in possession.*

But when one, who is in the *adverse possession*, gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land; for, his title is divested—he is out of possession and has no right to the immediate possession of the thing, nor can he bring any action until he regains possession. Then, by the *jus postliminii* or fiction of relation, he is considered as having been in possession all the time for the purpose of bringing trespass *quare clausun fregit* with a *continuando* from day to day, in which he recovers the value of the *mesne* profits and damages for the injury

done to his freehold by the severance of any part of it, or for any other injury consequent to the breach of his close. This action can be maintained against any one, who has been in possession for the time he held it, but the owner of the land cannot sue for the thing severed in trover or detinue as a chattel; for, it is not his chattel—it did not become so at the time it was severed, and the title to it as a chattel cannot pass to him *afterwards*, when he regains the possession, by force of the *jus postliminii*. The fiction is made to enable him to recover for breaking his close and the injuries consequent thereto, but it is not made for the purpose of vesting a right to chattels.

The action of trespass *quare clausum* for the *mesne* profits is a continuation of the action of ejectment. Hence, the judgment in ejectment is conclusive as to the title. Originally, the plaintiff in ejectment recovered actual damages. It was only for the sake of convenience, that the courts adopted the practice of trying the title only in the ejectment with sixpence damages, and then ascertaining the actual damages in a new action for the *mesne* profits and damages. But if this novel application of the action of trover or trespass *de bonis asportatis* for a thing severed and made a chattel, while there was an adverse possession, be introduced, it would be difficult to find any authority for holding, that a recovery in ejectment by John Doe is conclusive of the lessor's title in an action by him for the purpose of proving his title to a chattel.

It was said for the defendant, that the plaintiff ought not to recover, because he could get the value of his fodder, &c., by way of diminution of damages in the action by him (the defendant) for the *mesne* profits. This idea is of the first impression. We prefer to keep rights distinct, and allow each party, when his rights are invaded, his appropriate action.

PER CURIAM. Judgment affirmed.

WILLIAM HOUSTON v. JOSEPH M. BOGLE.

Before the passage of the act of 1840, ch. 28, no voluntary conveyance of property, even to a child, could be upheld to defeat an existing creditor, if the creditor could find no other property of his debtor, out of which to obtain satisfaction.

The act of 1840, ch 28, applies only to voluntary conveyances, made after that act went into force. Its application to prior voluntary conveyances would be unconstitutional, as it is not the province of the legislature but of the judiciary, to declare what the law was before the passage of any act. The legislature cannot divest vested rights.

The case of *Arnett* v. *Wanet*, 6 Ire., 41, cited and commented on.

The cases of *Hoke* v. *Henderson*, 4 Dev., 15; *O'Daniel* v. *Crawford*, 4 Dev., 197; *Jones* v. *Young*, 1 Dev. & Bat., 352, and *Smith* v. *Reavis*, 7 Ire., 341, cited and approved.

Appeal from the Superior Court of Law of LINCOLN County, at the Fall Term, 1848, his Honor, Judge *Moore*, presiding, to the Supreme Court at Morganton, and thence transferred, at August Term, 1849, to the Supreme Court at Raleigh.

This was an action of trespass *vi et armis*, brought to recover damages for wrongfully taking and selling a number of slaves. The material facts of the case are these:

The plaintiff offered in evidence a deed of trust, executed by one William L. Davidson, conveying the negroes in controversy to him, for the purpose of securing a large debt, which the said William L. Davidson owed to one Theophilus Falls, and several other smaller debts, due to other persons, for which the said Falls was surety. The deed was executed the 20th of February, 1833, the day it bears date, was proved before the clerk of Iredell county court of that county and was registered on the 26th day

of the same month. The plaintiff proved, that the defendant took the said negroes from the possession of the said W. L. Davidson, and sold them on the 20th day of May, 1840. The plaintiff also proved the value of the slaves.

The defendant then showed, that John D. Graham and wife, commenced a suit in equity against George L. Davidson, the father of the said W. L. Davidson, in 1829, and then offered in evidence the report, account and decree in said cause, after it was carried to the Supreme Court. The defendant proved by the said decree, that G. L. Davidson was one of the executors of one Conner, the father of the wife of the said John D. Graham, and, as early as 1809, he was appointed the guardian of Mrs. Graham, (then Elizabeth E. Conner,) and as the executor of the said Conner, and subsequently becoming the guardian of E. E. Conner, he was indebted to J. D. Grahamand wife in the sum of $3,958.69, on the 1st day of September, 1826. This amount of indebtedness arose mainly from the defalcation and insolvency of one Work, who had been a guardian, with the said Davidson, of the said E. E. Conner, and of an erroneous construction which the executor of said Conner had put upon his will in the division of the estate. The defendant also offered in evidence a decree in the Supreme Court, which Andrew Allison obtained against the said George L. Davidson in 1832. By reference to this decree, it appeared that G. L. Davidson was indebted to the said Allison on the 1st day of September, 1826, in the sum of $2,046.16. It was also proved by a deed of trust, executed by G. L. Davidson, that the said G. L. Davidson owed debts by bonds to different persons to the amount of $231.88, contracted previously to the 1st of September, 1826, which at that time and for several years after remained unpaid. It was proved that in June, 1825, the said Davidson obtained a discount at the branch of the old State Bank of North Carolina at Salisbury, for

$731. In relation to this debt the cashier of said bank stated, that by reference to the books of that branch of the bank, it appeared that the note was never renewed, but whether it was paid at maturity or not, he could not say. It was also proved that the said G. L. Davidson was bound as the surety of his son, W. L. Davidson, for $450, which he assumed to pay, and which he did pay, but at what time it was not stated. The whole amount of indebtedness thus proved is $7,507.83. The defendant also proved by the cashier of said branch bank, that G. L. Davidson was one of the sureties of one Simonton in a note discounted at said branch bank in January, 1826, for $3,705, and that after this time no further discount was obtained by said Simonton of any new note, nor of any note in renewal of the one above mentioned. It was in evidence, that Simonton died in the spring of 1826, having made a will, of which he appointed the said G. L. Davidson one of the executors, and possessed of an estate of $70,000 or $80,000, which proved to be largely insolvent. The defendants also proved, that the said G. L. Davidson was a surety for different persons, who had notes discounted at the said branch bank in June, 1826, amounting to the sum of $4,124, but whether said notes were paid at maturity or not, the cashier could not state. But he stated that no further discounts were obtained by any of those persons in renewal of the said notes. He also stated, that it was the universal practice of the said branch bank to require all notes, offered for discount, to be made payable ninety days after date, and that if the notes were not taken up in thirty days after they fell due, to put them in suit. It was proved that all the individuals for whom the said G. L. Davidson was bound as a surety in bank, except Simonton, were perfectly good and continued so, and one of the persons, for whom the said G. L. Davidson was bound as above mentioned, was examined, and stated that he paid off the debt which he owed in bank. There was

no evidence that G. L. Davidson had ever paid any part of the several debts, for which he was bound as surety in bank. The defendant proved that J. D. Graham and wife obtained a final decree, in their suit against G. L. Davidsan at December term, 1839, of the Supreme Court, caused an execution to be issued thereon shortly thereafter, directed to the sheriff of Iredell county, by virtue of which, the defendant, as sheriff of said county, levied upon and sold the negroes in controversy. The defendant also read in evidence a deed of trust executed by the said G. L. Davidson to George F. Davidson, dated the 20th of November, 1831, by which he conveyed six negroes, by name, two tracts of land and other property, in which deed was the following clause, "and all other species of property that I have any right to and not thought of at this time, whether real or personal."

The plaintiff read in evidence a bill of sale from G. L. Davidson to his son W. L. Davidson, dated 12th of December, 1831, by which G. L. Davidson conveys to his son W. L. Davidson, negro Hannah and her two children (a part of the negroes in controversy) for the consideration of $450, that being the value of said negroes.

The defendant then shewed that John D. Graham and wife in January, 1833, in their said suit against G. L. Davidson obtained an order of sequestration, and that, in execution of the same, the clerk and master, on the 2nd day of February thereafter, issued a writ to the sheriff, who took from G. L. Davvidson a bond on the 14th of February, 1833, and at the same time left with him a bond for W. L. Davidson, which was not executed until the month of April following. The negroes mentioned in the said bond are a part of the same sued for, and are the same that are mentioned in a deed, subsequently offered in evidence by the defendant, from G. L. Davidson to W. L. Davidson.

The defendant then proposed to offer evidence to prove that the deed of trust, which the said W. L. Davidson

made to the plaintiff in this action, was made to hinder, delay, and defraud J. D. Graham and wife of the debt which they were seeking to recover of G. L. Davidson. This evidence was rejected by the court. It was also proved that W. L. Davidson retained the possession of the property conveyed by him to the plaintiff, using it as his own, until it was levied upon by the defendant under the execution that issued upon the decree, which J. D. Graham and wife obtained against G. L. Davidson.

The plaintiff then proposed to read the registered copy of a deed for slaves from G. L. Davidson to the said W. L. Davidson, which was received, upon proof of the loss of the original. From this deed it appeared that G. L. Davidson conveyed to the said W. L. Davidson, on the 1st day of September, 1826, a part of the slaves in controversy, and the others it was proved were the increase of those that were conveyed, except Hannah and her two children. The said deed recited a consideration of $1,500; no part of which was ever paid, because the said deed was intended and so understood by the parties to be a deed of gift. Among the negroes mentioned in the said deed was one by the name of Lucy. W. L. Davidson stated that this negro Lucy was given by him to G. L. Davidson in exchange for the negro Hannah and her two children in 1831, which he conveyed to the plaintiff by the deed of trust, which had been read in this trial, from him to the plaintiffs. He also stated that the negro, which he gave in exchange, was worth as much as Hannah and her two children. The plaintiff also offered in evidence, a bill of sale from Geo. L. to the said W. L. Davidson for Hannah and her two children, dated 12th of December, 1831. It was proved, that all the property specifically mentioned in the deed of trust, executed by G. L. Davidson, on the 20th of November, 1831, had been sold by the trustee, and he stated, he believed the proceeds of the sale were sufficient to pay the debts secured by the deed. It was

in evidence, that the negro Lucy had been sold by G. L. Davidson, the trustee, at the same time he sold the other property. And there was no evidence that the trustee had ever claimed Hannah and her children, of W. L. Davidson, though he had had the actual possession of them, from since the ..... day of December, 1831. The plaintiff proved, that when G. L. Davidson made the deed to his son W. L. Davidson on the 1st day of September, 1826, he reserved to himself twenty-two negroes, which by the evidence of different witnesses were worth from $6,850 to $7,700, a tract of land worth $4,000, and other personal property of the value of $1,200, and one of the witnesses, W. L. Davidson, who stated that his father retained twenty-two negroes, which were not conveyed to any one, was called upon to give the names of them; he mentioned nineteen by name and stated that there were others, whose names he could not recollect.

The defendant's counsel objected that the conveyance from G. L. to W. L. Davidson, of the 1st of September, 1826, was fraudulent in law, if the said G. L. Davidson did not at the time he made said conveyance, retain property fully sufficient and available, to pay all the debts for which he was bound, as well as those in which he was the principal debtor.

2d. Though the said G. L. Davidson did, at the time he made the said conveyance, retain property fully sufficient and available to pay his debts, yet the said conveyance was fraudulent in law, if he did not keep said property to satisfy the debt of the said J. D. Graham and wife, when they sued out their execution.

The court instructed the jury, that G. L. Davidson was under the same legal obligation to pay his surety debts, as he was the debts in which he was bound as principal debtor only. If the property, which he retained, at the time he made the voluntary conveyance to his son, was not fully

sufficient and available to pay all his liabilities, by reason of the insolvency of one or more of the individuals for whom he was bound, the deed would be fraudulent and void as against his creditors. But if the debts, for which he was bound as surety, were paid off by the principal debtors, and he thereby exonerated, the said deed would not be fraudulent in law, if he retained property, at the time he made said voluntary conveyance, fully sufficient and available to pay all his other debts. The court further instructed the jury, if the said G. L. Davidson, at the time he made the said voluntary conveyance, retained property fully sufficient and available to pay his own liabilities, provided the debts for which he was bound as the surety of others were paid off by them, the said deed would not be fraudulent, as against the said J. D. Graham, though G. L. Davidson had no property at the time J. D. Graham took out his execution.

Rule for a new trial because of the reception of improper and rejection of proper evidence, for permitting improper remarks to be made by the plaintiff's counsel in his address to the jury, and for improper instructions to the jury. Rule discharged. Judgment and appeal.

*Craig*, *Bynum* and *Alexander*, for the plaintiff.

*Osborne*, *Boyden* and *Guion*, for the defendant.

PEARSON, J. The act of 1840, ch. 28, sec. 4, enacts, that no gift, by one indebted, shall be hereafter taken and held to be fraudulent and void in law; property at the time fully sufficient and available for the satisfaction of all of his then creditors being retained by such donor.

A very interesting question, upon the construction of this statute, was decided in the court below, and was ably argued in this Court. Are the debts for which the donor is bound, as surety, to be taken into the estimate, in ascertaining the amount of his indebtedness at the time

of the gift, and if so, is the property which is owned by the principal to be taken into the estimate, is ascertaining whether such donor retained property, at the time, sufficient and available for the satisfaction of all his then creditors?

We do not feel at liberty now to decide the question, because this case does not come within the operation of that statute. In September, 1826, one George L. Davidson being indebted to one Graham in an amount exceeding $3,000, made a voluntary conveyance of the slaves for which this action is brought, to his son, William L. Davidson. In 1829, Graham commenced a suit in equity for the recovery of the debt. In January, 1833, by an order in the cause, George L. and William L. Davidson executed a bond for the forth coming of the said slaves. The cause pended until 1839, when Graham obtained a decree for a large sum. Execution thereupon issued, and the defendant, as sheriff, took the slaves from the possession of William L. Davidson, and sold them in May, 1840. In February, 1833, William L. Davidson executed to the plaintiff a deed for the slaves, in trust for the payment of debts. And in September, 1840, this action was commenced for seizing and selling the slaves.

The statute was passed afterwards, and the question is, can it have any effect upon the rights of the parties in this case, or change the law, so far as they are concerned, from what it was, at the time their rights vested? According to the reasoning in the opinion in *Arnett* v. *Wanett*, 6 Ire., 41, by a proper construction of the statute, the word "hereafter" refers to the decisions of the courts and not to gifts, and the legislature intended to say, not only what the law should thereafter be, but what *it had been before*. If such was the intention, it is an excess of authority, and it is null and of no effect. The right to *make* laws is vested in the "General Assembly." The right to *decide* what the law is and what it was is vested

in the Supreme Court. The assumption of a right by the "legislative power" in December, 1840, to instruct "the supreme judicial power," how the law shall be "taken and held" to have been in 1826 or in May, 1840, is an infringement of the distribution of powers made by our form of government, and a breach of the fundamental principle set forth in the "bill of rights," sec. 4. "The legislative, executive, and supreme judicial power, ought to be forever separate and distinct from each other." It is settled, that the legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts. A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void. 1 Kent. Com., 455, and the cases cited.

If, as the case was, before the act of 1840, Graham, as an existing creditor, had a right to treat the gift of his debtor as void, and to subject the slaves to the payment of his debt: If the defendant, as sheriff, had a right and was bound in discharge of his duty, to seize and sell the slaves: If the purchase at such sale acquired a valid title; and if the plaintiff and William L. Davidson under whom he claimed, had no title, as against such creditor, sheriff and purchaser: If such *was the law;* and it was the intention of the act of 1840 to *change the law*, so as to divest Graham of his rights—to make the defendant liable to this action—to deprive the purchaser of his title—and to give a right of action and the title to the plaintiff, when he had neither before—it was an attempt to violate vested rights, and to take the property of one citizen and give it to another, which this court feels bound firmly to resist. A legislative act, which deprives one person of a right, and vests it in another, is not "a law of the land" within the meaning of the bill of rights, sec. 12. "No free man shall be deprived of his life, liberty, or property,

but by the law of the land." *Hoke* v. *Henderson*, 4 Dev., 15.

In *Arnett* v. *Wanett*, the first point was decisive of the case, and it was not necessary to decide whether the case came within the operation of the statute. In treating of it, the opinion is confined to the inquiry, as to the construction to be given to the word "hereafter." The power of the legislature to pass an act affecting vested rights and title to property, by declaring how the law should be "taken and held" to have been, before the passage of the act, was not taken into consideration.

As this case does not come within the operation of the act of 1840, the only inquiry is, what *was the law* at the time the right of the creditor attached and the property was taken, and this action commenced? The gift of the debtor to the son was voluntary. The creditor had an existing debt; and it is admitted that when he obtained his decree, and sued out execution, the debtor was insolvent, and there was no other property to which the creditor could have recourse, for the satisfaction of his debt. The matter was reduced to this. The donee must give up the property, for which he had paid nothing, or the creditor must lose a debt existing at the time of the gift. This is settled by the case of *O'Daniel* v. *Crawford*, 4 Dev., 197. That decision has been much discussed. We are entirely satisfied of its correctness, giving due consideration to the supposed expression of the opinion of the legislature. We believe the reasoning upon which it is founded is conclusive, and it has been cited and approved by repeated adjudications of this Court. *Jones* v. *Young*, 1 Dev. & Bat., 352; *Arnett* v. *Wanett*, 6 Ire., 41; *Smith* v. *Reavis*, 7 Ire., 341. In 2 Kent's Com., 442, that learned jurist says, "the very able decision of the Supreme Court of North Carolina in Dev., 1833, in *O'Daniel* v. *Crawford*, stands out firmly opposed to this enervating infirmity. It has established, by argument and authority, resting on the soundest foundation, the rule that no voluntary con-

veyance of property, even to a child, will be upheld, to *defeat* an existing creditor." By *defeat* he means to convey the idea that satisfaction cannot be otherwise obtained. We add nothing to the reasoning or the authorities by which the law of that case is supported.

The judge erred in his instructions, that the gift was not fraudulent and void as against Graham, though Geo. L. Davidson had no property at the time Graham took out his execution.

PER CURIAM. Judgment reversed and a *venire de novo*.

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RUTHEY ANN HANSLEY v. SAMUEL G. HANSLEY,

On the trial of issues directed by the court, upon a petition for a divorce, the mere confession of the husband that he was guilty of the adultery charged, is not admissible evidence.

A divorce *a vinculo matrimonii* will not be granted, unless it is alleged and shewn that the husband or wife lived in adultery, after the separation had taken place.

Appeal from the Superior Court of Law of New HANOVER County, at the Spring Term, 1848, his Honor, Judge *Caldwell*, presiding.

This is a suit instituted by Ruth A. Hansley against her husband, Samuel G. Hansley, for a divorce *a vinculo matrimonii*, and for alimony. The parties were married in 1836 and lived together until August, 1844; when the wife left her husband and went to reside with her brother in the same neighborhood, and has lived there ever since.

The petition was filed on the 25th day of March, 1845. It states, that the "petitioner lived for many years the wife of the said Samuel, enjoying much happiness, and fondly hoped to do so for many years yet to come, as she cheerfully fulfilled all the duties of an affectionate wife, until the conduct of her husband became so intolerable that it could no longer be endured: that, without any cause known to her, her husband took to drink, and, while in that state, would commit so many outrages against the modesty and decency of the petitioner, that she refrains from repeating them: that the influence of his intoxication would last sometimes for a month; all of which time the conduct of the said Samuel G. towards the petitioner would be intolerable; and the petitioner was often cruelly beaten by him, and his whole course of conduct towards her would be so entirely different from what she might have reasonably anticipated, that he rendered her life burdensome and too intolerable to be borne, from a habit so well calculated to destroy the reason, the affections and all the social relations of life, and to which the petitioner must attribute this brutal conduct of her said husband: that for weeks the said Samuel G. would absent himself from the petitioner during the whole night, although during the day-time residing on the same farm, while so absenting himself; that it has come to the knowledge of the petitioner, that her husband did habitually, while so absenting himself from the petitioner, bed and cohabit with a negro woman named Lucy, belonging to him: that for some time previous to this fact coming to her knowledge with that degree of certainty, upon which she could rely, her suspicions were aroused, that such must be the fact; but that, not being able to prove the charge, and not being satisfied to abandon her husband until the proof could be clearly satisfactory to her own mind, the petitioner tried to endure, as long as it was reasonable for any wife to endure, the conduct of her husband; and that, during all

the said time, her husband not only abandoned her bed entirely, and bedded with the said negro Lucy, but he deprived the petitioner of the control of all those domestic duties and privileges connected with the house, which belong to a wife, and placed the said Lucy in the full possession and enjoyment of those privileges and duties, and insulted the petitioner by openly and repeatedly ordering her to give place to the said negro, and saying that the petitioner was an incumbrance, and encouraged the said Lucy to treat her also: that, when the petitioner would no longer endure these things, and became entirely satisfied of the cause of such treatment, and of the truth of her previous suspicions, the petitioner abandoned her said husband: that, besides all this, her said husband, not satisfied with the treatment as above set forth, would go from home and take with him the keys of the house, and deprive the petitioner of food for two or three days at a time, and of every comfort, to which, as a wife, she was entitled: that often he would, at night, compel the petitioner to sleep in bed with said negro Lucy, when he would treat the said Lucy as his wife, he occupying the same bed with the petitioner and the negro Lucy: that from the cruel and severe treatment of her husband towards the petitioner, she was afraid to resist or to decline so occupying the same bed with her husband and the said negro woman: that, when it was not agreeable to her husband to permit the petitioner to occupy the house, he would often lock her out of doors and there compel her to remain during the whole night, unprotected and exposed to all the trials incident to such a situation: that she, at length, abandoned the residence of her husband in August, 1844, and has made her home with one of her brothers ever since: and that, since her knowledge of the adulterous conduct of her said husband with the said negro Lucy, the petitioner has not admitted

him to conjugal embraces, and is resolved never again so to do."

The petition then sets out the husband's estate, with a view to alimony, and it prays for a divorce from the bonds of matrimony and for a suitable provision.

The answer admits, that, at one period the defendant was intemperate and in the habit of intoxication; but it states, that, for several years before his wife left him, he had been perfectly sober. The defendant also admits that he chastised his wife once: but he denies that he ever did so but at that time, or that that was a violent or severe beating: and he says, that he immediately regretted having done so, and acknowledged that he was wrong and made the most humble apologies to her therefor, which he thought reconciled her: but that on the same night she abandoned his house. The answer then denies all the other allegations of the libel specially.

Upon issues submitted to a jury, it was found, that the parties had been inhabitants of this state for three years immediately before the filing of the petition: that the defendant, by habits of adultery with his slave Lucy, by degrading his wife, the petitioner, by beating her, by insulting her, and by abandoning her bed for that of the slave Lucy, rendered the petitioner's life burthensome, and her condition intolerable, so as to compel her to leave his house, and seek an asylum elsewhere: that the defendant did separate himself from the petitioner and live in adultery with the slave Lucy: and that was known to the petitioner for six months previous to filing the petition: that the petitioner always conducted herself properly as a wife and a chaste woman: and that the petitioner had not admitted the defendant to conjugal embraces since her knowledge of his adulterous intercourse with the said slave Lucy.

Upon the trial, in order to prove that the defendant was living in adultery with his own slave named Lucy, the

plaintiff offered evidence, that the defendant had a female slave, named Lucy, and that she had a child; and also of acts of familiarity on the part of the defendant with the said Lucy, and that she acted as a sort of manager of his house: and furthermore, that in conversations respecting this suit, the defendant said, that he would spend everything he had in defending it, except the said Lucy and his child; and that, in a conversation between a brother of the petitioner and the defendant about a reconciliation between the parties, the former said to the latter, if he would sell Lucy he did not know what the petitioner might do as to living with him again, and that the defendant replied thereto, that he would part with all the property he had before he would with the said Lucy and his child, and that the petitioner might stay where she was. Objection was made to the admissibility of the defendant's declarations, but, as it was not suggested, that those declarations were made by collusion, the court allowed them to go to the jury. There was a decree for a divorce *a vinculo matrimonii*, and for the costs against the defendant: and an inquiry was directed as to the settlement it would be proper to make on the petitioner; from all which the husband was allowed an appeal.

*Strange*, for the plaintiff, submitted the following authorities:

Greenleaf's Ev., sec. 108; 2 Phil. Ev., Hill & Cowen's notes, 29, note 298 to page 156; *Loveden* v. *Loveden*, 2 Hagg. Con. Rep., 1.

*W. H. Haywood*, for the defendant.

RUFFIN, C. J. The divorce act requires all the material facts charged to be submitted to the jury, upon whose verdict, and not otherwise, the court is to decree. It excludes by necessary implication, from the consideration of the jury,

admissions in the pleadings, and, consequently, any made orally on the trial. The purpose is to prevent collusion. That reason extends also to confessions *in pais*, when relied on to found a decree for divorce; for if they could be received, it would obviously defeat the requirement, that the facts shall be found by a jury, independent of their admission in the pleadings. It is not doubted, that, under circumstances, what a party says may, as well as his acts, be presumptive evidence of adultery. Thus letters written in the course of an intrigue, attentions paid and received, or terms of endearment used between the pair to whom guilt is imputed, assignations for private meetings, are admissible as being in their nature overt acts of criminal conversation. So, if a man and woman live together and act and speak upon the familiar terms of cohabitation, and, if the woman have a child, the man habitually treats and speaks of it as his child, that also would be evidence. But the acknowledging of the child is not received by itself as a confession merely, that he is the father, but as one incident among many connected with the intercourse of man and woman, and giving a criminal character to it, judging from the ordinary *indicia*, in the open conduct of men, of their secret acts. It is in the nature of an overt act, which tends to show the private habits of the man and woman. But that is very different from the mere declaration of this defendant to strangers, on two different occasions, that the child was his, without connecting them with any conduct of the defendant towards the child. They seem to be nothing more than naked confessions of a fact, from which adultery is inferred, and, as such, were not competent. But it is said, there was no suggestion, that these declarations were made collusively; and thence, that it is to be considered, the court had no right to infer it. It is to be remembered, however, that supposing the collusion, it will certainly not be suggested by either party, and there is no one else

to make the suggestion or establish the truth. The question, therefore, cannot turn on that, but it turns on this: that there is danger of collusion. Therefore, in order to guard against it, it is the office of the judge himself to exclude such evidence, though neither party objects to it, but both should desire it to be received. The public is concerned, that divorces should not be improperly decreed; and this rule in particular is intended to protect the public morals, and promote the public policy, rather than to guard against the effects of perjury on the party. For this reason, a *venire de novo* would be awarded, if there were nothing more in the case.

The Court, however, is of opinion that a sufficient case does not appear in the record to authorize a divorce *a vinculo matrimonii*, which is that granted and the only one prayed for. The jury, indeed, found that the defendant separated himself from his wife and lived in adultery with his slave; and, if there were any corresponding allegation in the libel, there would be a case to render the decree right. But we think there is no such allegation. There is such a want of precision as to the dates and order of events charged, that one cannot say exactly, how far the allegations were meant to extend. The only periods given are those of 1836 for the marriage, and August, 1844, for the separation of the petitioner from her husband and going to live with her brother. Everything stated in the libel is stated as having occurred between those periods. There is no separation of the parties alleged until that in 1844, when the petitioner left her husband's house, and there is no allegation of any adultery by him after that event. As far as we can understand the petition, it states that between the periods mentioned, the parties lived together on the husband's plantation, and for many years lived there happily; that he became, at some time, intemperate, and then was harsh, insulting and cruel to the wife—at times beating her; that occasionally, for a

while, and afterwards, for weeks, he absented himself from his wife's bed at night, and, as she suspected for some time, and afterwards ascertained, he spent those nights in bed with a negro woman he had on the same plantation: that he did himself, and allowed that woman to treat his wife with contempt, depriving her of all authority as mistress of the house, and conferring it on the negro: that, afterwards, instead of going to the house of the black woman, he brought her to his own house, and frequently made her and the wife sleep in the same bed with him, and in that situation he had carnal knowledge of the negro: that at other times the husband would not allow the wife to sleep in the house, but turned her out and locked the door against her and kept her out all night: that he at some times went away, carrying the keys and leaving her without food for several days together: and, finally that she never admitted him to conjugal embraces after knowledge of his adultery, and abandoned his house in August, 1844. Now, upon those allegations, and upon such parts of the finding of the jury, as are consistent with them, the wife would be entitled to a decree for separation and alimony. The grossness of his debaucheries, and the cruelty and indignity, with which he treated his wife, made her condition with him intolerable and authorized her to escape from his society and control. In such cases the third section of the act allows a divorce *a mensa et thoro* to be granted, so as to protect the wife from the efforts of the husband to force her to return. But those are not sufficient causes for a divorce from the bonds of matrimony, under the second section. That does not authorize such a divorce for cruelty, nor for every act of adultery, nor even for habitual adultery, provided the parties continue to live together. On the contrary, the words are, that when "either party has separated him or herself from the other and is living in adultery," the injured person may be divorced *a vinculo*. In addition, the

eighth section enacts, that if the party complaining admitted the other either to conjugal embraces or society, after knowledge of the criminal fact, it shall be a bar to a suit for divorce for cause of adultery. Now, in the first place, it is certain, upon the face of the libel, that the wife continued to live with the husband, not only after she knew such circumstances, as created the most violent presumption of his guilt, but after the actual knowledge of it by being present and in the same bed at the fact. There is no statement of any act of adultery, which we can say or suppose was posterior to those, to which the wife was thus privy. As they took place before the separation and she was privy to them, a divorce *a vinculo* cannot be founded on them by themselves. We are far, however, from thinking those defaults of the husband purged by the conduct of his wife. On the contrary she fully accounts for her finally leaving his house, and divested that act of the appearance of fault on her part. After such a separation, forced on her by the debasing depravity, violence and other outrages of the husband, she might well insist on any supervening criminality on his part. For, so far from being precluded from making complaint of the repetition of the fault, the guilt of the repetition, after such forbearance—not connivance—on the part of the wife, would be aggravated beyond that of the first fault. We shall hold, therefore, that she might insist on adultery with this slave, supervening the separation thus forced on her. From the evidence respecting the child, about whom the petition would hardly have been silent, if it had been born when it was filed, and from the findings of the jury, it may be presumed, that in fact the criminal and disgraceful connection between this man and his negro woman did continue after the petitioner left him. If so, it is unfortunate that it should have been omitted in framing the petition. That it is omitted, is quite clear; for, the petition gives no account of the

husband's life after the day the wife left him, excepting only that he had not subsequently been admitted by her into conjugal embraces. The finding of the jury, therefore, that the husband separated himself from his wife and is living or afterwards lived in adultery, and that she never admitted him into conjugal embraces after her knowledge of that adultery, can have no influence on the decree, because it is incompatible with the petition, or, at least, is without any allegation in the petition of such supervening adultery, to authorize it. That the existence of such adultery in fact is indispensable, is clear from the words of the act "is living in adultery" after the separation. But it is equally clear from the reason of the thing. For, the law does not mean to dissolve the bonds of matrimony and exclude one of the parties from marriage, until there is no just ground to hope for a reconciliation. For that reason a divorce of that kind is denied, when the parties give such evidence of the probability of reconciliation, as to continue to live together. And even when there is a separation, if the offending party should reform forthwith and lead a pure life afterwards, the law does not look upon it as hopeless, that reconciliation may in time follow the reformation. It may not be a case, indeed, in which the law will permit the husband to insist on a restoration of the conjugal rights of society and cohabitation, by compelling the wife's return. But, on the other hand, it is not a case in which it is past hope, that the wife may not, upon the strength of ancient affections, and a sense of duty and interest, be willing of herself, at some time, to partake of the society and share in the fate of her reformed husband; and, until that be past hope, or, at least, a continuing impurity of life, after separation, so far impairs the hope of reformation as to leave no just expectation of it, the law will not cut off the parties from the liberty of uniting. In the present case, there is

nothing in the petition to shew, that the husband and his former paramour have ever seen each other since the day the wife left the premises. Consequently, the decree was erroneous, and the petition ought to have been dismissed, notwithstanding the verdict; which will be certified accordingly.

PER CURIAM. Ordered to be certified accordingly.

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DEN ON DEMISE OF VINCENT REED, et al. v. PETER EARNHART, et al.

Where A., B., C. and D. had had possession of a tract of land for upwards of forty years, under successive conveyances from A. to B., from B. to C. and from C. to D., with the exception of five years, between the twentieth and twenty-fifth year, during which period no possession was proved; it was *held* that, notwithstanding, a presumption arose of a grant from the state.

A continuous, unceasing possession is not necessary to raise such a presumption.

The presumption of a grant, from long possession, is not based upon the idea, that one actually issued; but because public policy and "the quieting of titles make it necessary to act upon that presumption." The presumption can only be repelled by proof of the fact that the state never did part with its title.

RUFFIN, C. J., *dissentiente.*

The cases of *Fitzrandolph* v. *Norman*, N. C. Term Rep., 131; *Chandler* v. *Lunsford*, 4 Dev. & Bat., 407, and *Holdfast* v. *Shepard*, 6 Ired., 364, cited and approved.

This was an appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1847, his Honor, Judge *Pearson*, presiding, transferred from the Supreme Court at Morganton to this Court, by order of the Court.

A grant to the lessor of the plaintiff issued in June, 1845. The defendant relied upon color of title, and seven years, possession, and the presumption from long possession, that the title was out of the state. He read in evidence a deed from David Woodson to George Miller, dated in May, 1802 and registered in 1809, a deed from Miller to one Wallace in 1811, a deed from Wallace to Peter Earnhart in 1812, a deed from said Earnhart to one Buchanan in 1829, for a part of the original tract, which is not sued for, and a deed from said Earnhart to the defendant in 1836, for the part now in controversy. He proved, that Miller took possession in May, 1802, and held possession by his tenants until he sold to Wallace in 1811; that Wallace lived on the land from the time he purchased until 1812, when he sold to Earnhart, who lived on the land until 1821, when he put one Pierce in possession, as his tenant, who lived on the land until the fall of 1822. In 1827 Earnhart put Buchanan in possession, who lived on the land for several years, and in 1829 Earnhart gave him a deed for 103 acres of the tract, and in 1830 put one John Earnhart on the remaining 90 acres of the tract, who lived on it, as his tenant, until 1835, when the said Peter Earnhart sold and conveyed to the defendant, who immediately took possession, and has been in possession ever since. To prevent the presumption of title out of the state or repel it, the plaintiff proved, that from the fall of 1822, when Pierce quit the possession, up to 1827, when Buchanan entered, the land was unoccupied, and the house and fences had rotted down. The court intimated the opinion, that, notwithstanding this proof, it would be the duty of the jury, to presume title out of the state, if the evidence offered by the defendant was true. In deference to this opinion the plaintiff submitted to a nonsuit, and appealed.

*Boyden* and *B. F. Moore*, for the plaintiffs.

*W. H. Haywood*, for the defendants.

PEARSON, J. The single question is, was it the duty of the jury to presume title out of the state, from the fact that actual possession had been held of the land from 1822 until 1845, under a connected chain of registered deeds, with the exception of five years (from 1822 to 1827) during which it was unoccupied?

The presumption of a grant, from long possession, is not based upon the idea, that one actually issued; but because public policy and "the quitting of titles" make it necessary to act upon that presumption. It is the duty of the court to instruct the jury, when land has been for a long time treated and enjoyed as private property, to presume that the state has parted with its title, unless the presumption is repelled by proof that such is *not the fact.* Long possession changes the truth of proof: and a grant is to be presumed, not because the jury believe, as a fact, that one issued, but because there is no proof that it *did not issue.* So if one suffers water to be ponded upon his land for twenty years, the jury are told to presume a grant of the easement, not because they believe a deed was executed, (for, if so, it would be seldom worth while to rely upon the presumption,) but because there is no proof that one was not executed: so if a bond has been standing for twenty years, (ten by statute,) the jury are told to presume it has been paid, unless it be shown that it was not paid. So if a woman swears a child, under the bastardy act, the jury are told to presume the person charged to be the father, not because the evidence satisfies them that he is, but because he is to be so considered for the purpose of maintaining it, unless he can show that he is *not the* father.

These instances are stated to explain the nature of the presumption, upon which the defendants' title rests. What will raise the presumption and what will repel it, are questions of law, about which it is the duty of the court to direct the jury; whether the fact be proved or not is solely for the jury; but whether there be a presumption,

or whether it be repelled, are not open questions, for the jury to decide, according to their belief of the fact, upon circumstantial evidence.

In England a possession of sixty years or more is required. The earlier cases in this state also required sixty years. But the necessity of the rule, and its manifest good policy, in a new-settled country, induced our courts to shorten the time; and by successive decisions it has been reduced to fifty, forty, thirty years, and an intimation is made that it might be supported by twenty-five years.

The necessity of the rule arises from the difficulty of making proof in relation to transactions of a remote date. The loss of papers, death of witnesses, treachery of memory, make it almost impossible to establish with legal precision, the existence of facts which occurred many years ago. Reasonable presumption must therefore be acted on. Long possession affords this reasonable presumption. To require proof of particulars and of detail, as to past occurrences, would be inconsistent with the necessity, which gives rise to the rule, and renders its practical application impossible. For instance it has been proved that for sixty years a tract of land has been occupied and treated as private property, first by A., then B., C. and D. This general fact can be proved. But, if, before the presumption of title out of the state can be made, it be necessary to go into particulars and show the connection between A., B., C. and D., and how one claimed and derived from the other, &c., these particular facts cannot be proved. This difficulty of making proof is the foundation of the rule. Hence to require such proof is inconsistent with the reason of the rule, prevents its practical application, and renders it illusory and useless, in the very cases where it is most needed. We find it therefore settled in *Fitzrandolph* v. *Norman*, N. C. Term Rep., 131, which is followed by the recent case of *Chandler*

v. *Lunsford*, 4 Dev. & Bat., 407, that a connection between the occupants need not be shown, but the general fact, that the state or its agents allowed first one and then another to use the land as private property for a long time, raises the presumption, that the state had granted the title to some one. It is not necessary to fix upon any one in particular as grantee, so the title is out of the state. These two cases, it seems to me, settle the question. For the very same reasons, which dispense with the necessity of showing a connection between the occupants, also show that it cannot be expected and is inconsistent with the reason of the rule, to require proof of a connection between the periods of time, when such posssession was held, as that when A. quit the land B. immediately entered; so with C. and D.; for it is just as impossible, after the lapse of a great many years, to show the particulars, as whether it was a month, six months, a year, ten years, &c., after A. left before B. entered, and so as to C. and D., as it is to show by what title B., C. and D. came in; and there is the same reason for dispensing with proof of the one as of the other. The substance of the rule is, that the land shall be held as private property, for a great many years, and as the occupants need not be connected, so the periods of time need not be, provided the time it is so occupied (for this is the essence of the rule) be for sixty years or more, as the rule at first stood. But it is said, since the time is reduced to thirty years, there is not the same difficulty of proof, as to the period of time, when one went out and the other came in. True, nor is there the same difficulty of proof as to the connection of the occupants. But as to this latter circumstance, it is not pretended that the rule is changed by shortening the time: why should it be so, as to the former? There is no intimation, in any of the cases, that the time is made shorter, upon condition, that there should be a *compensating* change by showing a connection between the persons and the periods of pos-

session. On the contrary, the decisions are put upon the ground, that the rule remains the same in other respects. Its policy is so beneficial that the time should be made shorter. So, if a connection between the periods of possession was not necessary, when the time was seventy years or more, there is no authority for making it necessary, now that the time is thirty years.

The course of the courts in shortening the time has been concurred in by the legislature. The act of 1791, under certain circumstances, gives title from a possession of twenty-one years. That act does not supersede the common law rule, but gives a new mode of acquiring title, leaving the common law presumption as it was. It gives a title against the state from twenty-one years' possession, if these things concur, color of title, connection between the occupants, and continued possession. It is certain that the first two are not requirements of the common law rule, and the connection, in which the third is used, tends to confirm the conclusion that it was not. At all events the fact that the act of 1791 requires a continued possession, furnishes no proof that the common law rule did so. The argument proves too much, for it would follow that color of title and connection between the occupants were requisite by common law, as they are required by the act. Care should be taken not to confound the common law rule with this statute. I have no doubt that a failure to keep the difference in mind, has, among the profession and in the reports, introduced a confusion in the use of words, which is the next thing to a confusion of ideas, and unconsciously leads the mind to a false conclusion. In the English books nothing is said about *continued* possession, and I find no case where an interval in the possession, such as occurred in this case, is noticed or made a point of. The language of the books is, "title will be presumed from long possession"—"a possession for a great many years, authorizes a presumption of anything to

support the title"—and when the expression of "uninterrupted possession" is used, it is not to convey the idea of "continued" in the sense we use it—incessant, unceasing—but to convey the idea, that the occupant has not been "interfered with" or "evicted" by the assertion of an adverse title. His possession is not considered as interrupted, although he may not, as few owners do, find it convenient at all times to keep "his foot" upon the land. The phrase, in reference to prescription, of which the rule of presumption is a modification, is not that the enjoyment has continued—incessant, unceasing—but that "the memory of man runneth not to the contrary;" that is, no living man can recollect a time, when the enjoyment was prevented or hindered, by one denying the right, which would be a notable fact, apt to arrest public attention. Whereas the silent fact of *permitting* a tract of land to be unoccupied for a season would escape attention, and no stress was laid upon it. In our books, although there has been a decision upon it, the judges, in treating of the common law presumption, frequently use the words "long *continued* possession of the party or those *under whom he claims.*" These words are as much out of place, as would be the words "color of title," in reference to the common law presumption; but when a connection between the occupants appears in a case, and no question is made as to the continuance of possession, the use of these words, it is supposed, does no harm, and they are unconsciously imported from the act of 1791, and this imperceptibly creates an impression, that the common law rule had similar provisions.

The act of 1791 creates a legislative grant, and the act of 1715 ripens the title. Hence it was proper, not only to require color of title, but a connection between the occupants and a continued possession. On the contrary, the common law rule does not confer a title, but simply raises a presumption, that the state has parted

with it. As there is such a difference in the results, it would be strange if the requirements were the same.

A plaintiff in ejectment shows color of title and seven years' possession in the lessor. He then shows a grant to the *defendant;* this entitles him to recover. So, if he shows that the defendant was in possession, under color of title twenty-one years, or without color of title thirty years, or that the defendant was in possession twenty-four years when the lessor evicted him. The defendant's possession for twenty-four years added to the lessor's possession of seven years, takes the title out of the state, which is sufficient for the purpose of the plaintiff, if the state is presumed to have parted with her title, because A. is permitted to keep possession twenty-four years, and B. (who evicts him) seven years. The like result would follow, it would seem, if A. is permitted to keep possession twenty years at one time and fifteen at another, after an interval of five years; for in both cases there is a new possession, and, if that does not prevent the presumption in the one, there is no reason why it should in the other. In the latter case, A. has been permitted to keep possession thirty-five years. This is inconsistent with a title in the state, and the fact that the land lay idle for five years has no bearing on the question, because it does not tend to prove that the state *had not granted* the land, unless this state of things was caused by actual possession being taken for the state or some assertion of her title; for if A. let the land lie idle merely because it was not convenient for him to occupy it, it is difficult for me to conceive how *perfect inaction* on the part of the state and its agents, can repel a presumption, which otherwise would be made, and show that the state had *not granted the land.* The proposition involves the absurdity of making the title of the state depend upon a mere accident, not affected in the slightest degree by any action on her part; the very

reason for making the presumption being the inaction of state and her agents, for a great many years, while individuals are using the land as private property.

The argument urged to show that there must be continued possession is, that at the end of twenty years, if A. goes out, the state, not having lost her title, has a constructive possession, so that when he comes back, after five years, he has a *new* possession, and thus there is a new point of departure from which the time begins to run. The same reasoning would show the necessity of a connection between the occupants; for when a third person takes possession, there is a new possession. But in truth the reasoning is fallacious, as applicable to a common law presumption, and is an importation from the act of 1715, which takes away the right of entry of the owner if he fails to enter or make claim in seven years next after his right accrues. Under this act, if the possession is left vacant before the seven years expire, and the trespasser afterwards enters, this second entry is a new trespass, a new cause of action and the time begins to run from such new right of action. So if a third person enters and evicts the first trespasser, before the seven years expire, this is a new cause of action and the time begins to run from that date. For, as the object is to acquire a title under the statute, its provisions must be rigidly complied with. *Holdfast* v. *Shepard*, 6 Ire., 364. But where the object is to show title out of the state merely, the matter is entirely different. The connection between the occupants is not necessary and the possession need not be continuous. The fallacy of the argument lies in attempting to draw an analogy from a statute and apply it to a rule of the common law, and in not giving due weight to the distinction that the statutes perfect title; the common law rule only presumes title out of the state. The statutes countenance and aid the common law rule, and, by no fair inference can this be made to abridge it.

The defendant cannot show title in himself under the act of 1791. His actual possession was only continued twenty years and six months at any one time, and the requirements of the statute must be rigidly complied with. But the rules of the common law are more pliable and *fit themselves* to every combination of circumstances, when there "is the like reason." Its admirers boast that, "reason is the life of the law," and "when there is the like reason, there is the like law." If a *continued* possession for thirty years, without color of title, and without showing a connection between the occupants, raises a presumption, that the title is out of the state, does not the "like reason" call for the same presumption, when there has been a possession for *forty-two years*, by persons claiming under a connected chain of registered deeds, with the exception of five years, when the land was unoccupied? Is not the probability, upon which the presumption is founded in aid of proof, as great, if not more so, in the latter case, than in the former? or can that system of law, which in the one case secures the title, and does not in the other, deserve the high distinction of being the "perfection of reason?"

The objection, that, in order to justify the presumption, the possession must be shown to have been *unceasing* for thirty years (if an interval of five years be fatal, five months must have the like effect) is now made for the first time. Its novelty certainly does not recommend it. There is no decided case to sustain it. The only countenance it receives is from a few loose expressions, evidently drawn from the act of 1791. The reason of the thing and the foundatian of the rule of presumption directly oppose it.

NASH, J., concurred.

RUFFIN, C. J., *dissentiente.* The possession of the defendant was for about twenty years, and he then abandoned

the premises and they were vacant for five years. Subsequently he entered again, and was in possession for fifteen years, before the issuing of the grant, under which the plaintiff claims. The tendency of the adjudications in this country follows the current of legislation, in shortening the periods, in which presumptions may be made, whether of deeds or grants or other things; and I have concurred with my brothers heretofore, and now, in saying thirty years' possession of lands will authorize the presumption of a grant of them. That, I think, is the shortest period which can be stated, as, in itself, creating a legal presumption of a grant. Some particular time must be fixed on; and until the legislature shall think proper to alter that prescribed by the statute, where the presumption from possession is aided by the other two circumstances of a colorable title and known and visible boundaries, it would seem the courts could not admit less than a possession of thirty years to have that effect. In all the cases hitherto there has been a possession for the period of thirty years or more, expressly stated, except one; and in that it was said to have been for twenty-five or thirty years by continued cultivation, and for several years more by such acts of ownership as getting timber annually. I should think, therefore, that there had been a sufficient length of possession here—for about thirty-five years at different times—if it was of such a nature in other respects as to authorize a conclusive legal presumption, that a grant had issued for this land. It seems to me, that it is not of that nature, because of the chasm of five years between the different possessions; so that there has been at no time a sufficient possession to constitute in itself a title. It has been the prevailing impression, that nothing less than a long-continued possession will lay the foundation of a presumption of a deed or grant. As Lord Keeper HENLEY said, in *Fanshaw* v. *Rotheram*, 1 Eden, 275, *quieta, longa, et pacifica possessio* is considered

as the best evidence of title. But it would seem from the very terms used in speaking of it and from the nature of the thing, that it must be *one* possession, long and quiet. When we say that possession raises a presumption, we must admit, at the same time, that, when the possession ceases, the presumption must fall with it. Therefore it would seem, if the possession do not continue long enough to afford an inference of title in itself, that, upon its termination, the whole inference, which the possession up to that time tended ultimately to establish, vanished and the title was set at large again. When we say, that a particular thing or state of things creates a presumption in law, that thing or state of things must be complete, in order to have that effect. This thing of possession, for example, may, though short of thirty years, be, with other facts and circumstances, very proper to be weighed by a jury as evidence, that a deed was formerly made; but, if it be at all less than thirty years, it fails to establish, by presumption in law, the existence of the grant alleged. The reason why a possession, which is required by law of a particular duration, must be completed by an efflux of the whole time before it ceases, in order to its being at all efficacious is, that upon a *cesser*, the possession, being vacant, vests in the true owner by implication. Here upon the defendant's going out, the possession, as well as the title, was in the state. It is like the case of a payment of a bond, presumed after the lapse of twenty years after it falls due. Less than twenty years will not authorize the court to direct the jury to find the payment: and, if the obligor make a payment in the twentieth year, the day of that payment is the point of departure, not for the completion of the twenty years that were going on, but for a new twenty to commence then and be complete before the presumption will again arise. For my part, I acknowledge, that it has always been my understanding, that, in all such cases, the benefit of a previous possession

was lost, if interrupted before the whole period was accomplished. Such are the terms of our statute of limitations, barring the entries of individuals or the title of the state. They require a continued possession under a claim of title. That provision is not arbitrary, but it is apt to the conclusion, which the acts allow to be drawn from the possessions prescribed in them. A possession continued for twenty-one years under certain circumstances, is a bar to an entry under the state. Why did the statute require the possession to be continued for that period? Plainly because a continued possession only is any evidence of title. Men, who own land, do not generally, if ever, abandon it after taking possession. It would be the duty of the court to require the same species of possession, when used to raise a presumption of a grant at common law, which the statute prescribes as to the cases within it. But the truth is, that the statute is expressed in that manner, only because at common law and in the nature of a presumption from possession, such possession must be continual, to be efficacious. That no one thought otherwise appears from the language, which fell from the judges in almost every case that has come before them. In *Hawks* v. *Tucker*, 2 Hay., 147, it is called a "uniform" possession for twenty-one years. In *Fitzrandolph* v. *Norman*, N. C. T. R., 132, there was a continued possession for forty-six years and by the defendants for thirty-five, and Chief Justice TAYLOR spoke of a "long-continued possession" going to the jury independent of the act of 1791. It is true, that disconnected possessions were then received in evidence; but it was not as authorizing the court to pronounce upon the presumption from them, but expressly as circumstances to be weighed by the jury. In *Rogers* v. *Mabe*, 4 Dev., 180, the Court take notice, that there was a clear and "continued" occupation of the land for forty or fifty years after filling up all chasms. So in *Chandler* v. *Lunsford*, 4 Dev. & Bat.,

407, there were thirty-five years of "continued possession" by persons under each other. And in *Morris* v. *Commander*, 3 Ire., 500, the Court said there must be an enjoyment "continually" for twenty years. So Lord COKE says, in *Bedle* v. *Beard*, that it is "in respect of an *ancient* and *continual* possession" that lawful grants are intended. 12 Rep., 5. Indeed, if disconnected possessions of this sort would answer, I presume some case would be found, either in England or in this country, in which effect has been given to them. There are cases in which divers possessions and other acts of ownership have all gone to the jury together, as evidence to be weighed by them; but, as far as I have been able to examine, consistently with my other duties, I have not been able to find a single one, in which the Court has ventured to declare the presumption of a grant, where there was not continual adverse possession for the prescribed period; and I am for adhering to the rule, as I know not what mischiefs may grow from the Court's making these artificial presumptions, with less and less grounds for them. I think there is but little danger that possessions, when continual, cannot be proved for the period adopted in this state. But in the present case, the fact is affirmatively shown that the defendant was out of possession five years; and, therefore, this is not an instance in which it can be apprehended that the defendant, with a good case, had failed to prove it. For these reasons, my opinion is that the judgment ought to be reversed.

PER CURIAM. Judgment affirmed.

JOHN Q. BARBEE v. WESTWOOD ARMSTEAD, et al.

A married woman cannot make a contract with her husband, except through the intervention of a third person, to whom the duty of enforcing it, in her behalf, belongs. It must be by deed, to which she must be a party.

Where a man had enticed away another man's wife, and he and the husband entered into a written contract, by which it was stipulated that the former should retain the wife and support her; *Held*, that this contract was against public policy, and, at all events, that the husband could rescind it, by making a demand for the restoration of his wife, and, if this was refused, had a right to his action for the subsequent detention;

*Held*, that an action on the case will lie by the husband against one who entices away his wife.

Appeal from the Superior Court of Law of WAKE County, at the Spring Term, 1848, his Honor, Judge *Caldwell*, presiding.

This was an action on the case to recover damages for enticing the wife of the plaintiff to leave him and detaining her, whereby he lost her services and the comfort of her society. It appeared on his behalf that his wife left him in August, 1841, by the enticement of the female defendant, who lived with the defendant Armstead, and is the mother of the plaintiff's wife. She assigned, as a reason for it, that the plaintiff was lazy and did not provide for his family, and she did not wish her daughter to perish. And it also appeared that the plaintiff had a child by his wife before their separation, and that they continued to live with the defendants from August, 1841, up to the trial. In the spring of 1845, or as a witness said, speaking at the trial, about three years ago, he went with the plaintiff to the house of the defendant to demand his wife and

child; that after some conversation between the plaintiff and the defendant, Armstead, the plaintiff demanded of him the surrender of his wife and child: that the defendant said, he could bring them forth by speaking one word, but he would not do it; and further said to the plaintiff that his wife would not live with him because he had advertised her.

On the part of the defendant it appeared, that some time in the last of July or first of August, 1842, the plaintiff and defendant, Armstead, through the intervention of one or two of their neighbors, entered into a written contract, in which it was agreed that the defendant, Armstead, should keep the wife and child of the plaintiff, and should raise, educate and provide for the child by giving it the portion of his property intended for its mother. And it was also provided in the contract, that the plaintiff should be allowed to visit his wife and child, and remain with them not exceeding four or five days at any one time. It also appeared that the plaintiff had been at the house of the defendant in 1842 on one or two occasions before the written contract was entered into, and had said in reply to a message sent him by the defendant, Armstead, that he, the said defendant, could provide for his child better than he, the plaintiff, could, and as for his wife he did not think they could get on together. After the written contract, the plaintiff was seen at the house of the defendant on several occasions. It also appeared, that, after the written contract, the precise time not appearing, the plaintiff said he had sold his land, that he had understood his wife had a notion to come and live with him, but he did not wish her to do so. Through some of the witnesses it appeared, that the plaintiff led somewhat of an itinerant life; and through others that he did not provide very well for his family. The child, as it appeared, was of tender years. The plaintiff's counsel insisted, that the

written contract was void, because contrary to public policy; that on the demand of the plaintiff and refusal of the defendant to give up the wife, a distinct cause of action accrued, supposing there had been an assent on the part of the plaintiff. And the counsel also insisted, that the defendants were liable for the original enticement and detention of the plaintiff's wife.

The court charged, that all acts of enticement and detention of the plaintiff's wife, previous to the 11th of June, 1842, were barred by the statute of limitations, the writ not having been sued out till the 11th of June, 1845; that, if the wife was detained by the defendants from the custody of the plaintiff and against his will, between the 11th of June, 1842, and the execution of the written contract, he would be entitled to recover damages on that part of the case. In relation to the written contract, the court charged, that it was valid, and no demand, on the part of the plaintiff, for the surrender of his wife, would give him a cause of action after the execution of the said agreement.

The jury returned a verdict for the defendant.

A new trial was moved for and refused and the plaintiff appealed.

*McRae* and *Busbee*, for the plaintiff.

*H. W. Miller*, for the defendants.

NASH, J. That deeds, for the separation of married persons, may by the laws of England, be valid and effectual, to many purposes, cannot be doubted. The principle has been affirmed in too many cases in that country, to be now safely questioned; yet that they are at variance with sound policy has been often declared by many of the ablest English judges—by Lord ROSSLYN in *Legard* v. *Johnston*, 3d Vesey, 358—by Lord ELDON in *Beard* v. *Webb*, 2nd Bos. and Pul., 93, and in *St. John* v. *St. John*, 11th Vesey, 526—and by Lord ELLENBOROUGH in *Rodney*

v. *Chambers*, 2d East., 288. But if all these cases, decided in that country, upon that subject, be sustainable, they fall very short of being authorities in this. *They* are decisions upon solemn deeds. To apply the principle to such a transaction as this, would be extending the evils complained of to an alarming degree. It would be loosening another screw in the machinery of married life, marring its operations, weakening its obligations and producing discord and confusion, when peace and concord ought to reign. Without therefore intending to express any opinion upon the doctrine of the English courts, or whether it is or is not to be introduced into this state, it is sufficient to say, the question does not arise here. A married woman cannot make a valid contract with her husband, except through the intervention of a third person, to whom the duty of enforcing it, in her behalf, belongs. It must be by deed to which she must be a party—as being deeply interested in the matter. *Jones* v. *Waite*, 35th E. C. L. R., 130, 142. If it were not so, she would be entirely at the mercy of her husband, and might at any moment and without notice be driven from her home and stript of all her rights and privileges as a wife and mother. There is no deed of separation here, and, if the contract had been reduced to writing, it is but a parol contract between the plaintiff and defendant, to which the wife of the former was not a party; a contract, in substance, giving to the defendant liberty to harbor the wife for no definite period of time, conferring on the defendant no interest whatever, and revocable by either at any moment. It also secured to the plaintiff the right to cohabit, at the defendant's house, with his wife, at any time he pleased; and it is shown by the case, that the plaintiff did visit her at the defendant's house after the contract, as well as before, and cohabit with her. It was neither in form or substance a contract for a separation, but simply a license to harbor the wife and child, securing the defendant against any

legal responsibility for so doing, until withdrawn. The defendant, therefore, was a wrong-doer, not only in the original act of harboring, but also for the continuance of it, after the withdrawal of the license by the defendant. But it is urged by the defendant, that if the contract was but a license, a demand of his wife by the plaintiff was no revocation. The license, being by parol, could be put an end to by parol, upon the principle of law "*eo legamine quo ligatur.*" Nor is there any special form, by which it shall be effected: anything said or done by the party giving the license, which notifies to the person enjoying it, that it is revoked is sufficient. The authorities, cited by the defendant's counsel on this point, do not sustain him. The reference to 1st Ch. Gen. Prac., p. 134, is incorrect as to the page; there is nothing there on that subject. The cases from the English common law reports are rather authorities against him. That of *Carpenter* v. *Blandford*, from the 15th vol., was in assumpsit, to recover a deposit of money for failing to execute a contract for the purchase of a public house and furniture, the whole to be valued by appraisers on a particular day. At the time appointed, the plaintiff's appraiser informed the defendant, that he could not meet on that day, but could the next. No objection was made. On the next day, the plaintiff appeared on the premises with his appraiser, when the defendant declined going on with the business, and informed the plaintiff he ought to have come the day before—he was too late. The only point decided, that the defendant, in not notifying the plaintiff, when informed that his appraiser could not attend on the day appointed, that he would insist upon a performance of the contract agreeable to its terms, that he had waived his right to do so as a forfeiture, is "*strictissimi juris.*" The case of *Lewis* v. *Pondsford*, from the 34th E. C. L. R., 585, was an action of "*quare clausum fregit.*" The defendant had executed with his wife a deed

of separation, but it was not executed by the trustee. The trespass consisted, in entering the house of the plaintiff, against her will, in search of his wife. The court decided, that by the deed, a license was given to the wife to live where she pleased. After this license, the court say, "that he could not go to any person's house to retake her; he should at least have given notice to persons that he revoked the license." This is an authority tending to show, that, although the defendant had executed the deed, yet it operated only as a license to the wife and could be revoked by parol. The case of *Warrender* v. *Warrender*, 2nd Clark and Finelly, 561, is to the same effect. There Lord BROUGHAM declares, that—notwithstanding a deed of separation had been executed, the husband had a right to reclaim his wife—his language is "no pledge can bind the party, not to reclaim his or her conjugal rights; for such pledge is against the inherent condition of the married state, and against public policy." The plaintiff in this case, his license being by parol, had a right to reclaim his wife. His demand was a revocation of his license to the defendant, to harbor her, and he was a wrong-doer in refusing to do so.

Finally, the defendant insists, that the plaintiff has misconceived his action, and ought to have sued in trespass. Mr. Chitty in the 1st vol. of his treatise on pleadings, page 91, says that trespass is the appropriate remedy for seducing away a wife, or seducing a daughter; but he does not say that it is, in either case, the only remedy; and on the same page he states, that for the latter offence, it has been *usual* to declare in case.

The same principles govern the action for each injury—the legal inability of the wife or child to assent to the act. Where the injury is both immediate and consequential, either action can be supported—page 147. If there be a doubt as to the form of the action in this case, it is whether

the plaintiff could have maintained trespass for a detention, even after demand.

His Honor instructed the jury that for a detention of the wife before the 11th of June, A. D. 1842, the plaintiff was not entitled to any damages, as three years had elapsed from that time, before the action was brought, which was on the 11th of June, A. D. 1845, and that for the detention between the 11th of June, 1842, and the making of the contract, an action would lie. In both these points no error is perceived. He further charged, that the contract was valid, and no demand, on the part of the plaintiff, for the surrender of his wife, would give him a cause of action after its execution. In the latter part of the proposition there is error: for which a *venire de novo* ought to issue.

PER CURIAM. Judgment reversed and a *venire de novo*.

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THE STATE v. JACOB BOYCE.

Permitting a man's slaves to meet and dance on his premises on Christmas Eve or other holidays, even though other slaves, with the permission of their masters, participate in the enjoyment, and though some of the younger members of the owner's family occasionally join in the dance, does not constitute the offence of keeping a disorderly house nor any other offence.

The case of the *State* v. *Matthews*, 2 Dev. & Bat., 424, cited and approved.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Spring Term, 1848, his Honor, Judge *Settle*, presiding.

STATE *v.* BOYCE.

The indictment charges that the defendant, on the 1st day of September, 1847, and on divers other days before the taking of the inquisition, did keep and maintain a certain common, ill governed and disorderly house, and in said house, for his own lucre and gain, certain persons, both men and women, and white and black, of evil name and fame, and of dishonest and lewd conversation, to frequent and come together at unlawful times, as well in the night as the day, and on Sundays, and there to be and remain, drinking, tippling, and otherwise misbehaving themselves, and other evil practices to carry on, did unlawfully and willfully permit, to the common nuisance, &c., and evil example, &c.

On not guilty pleaded, the evidence was as follows: A witness stated that at Christmas, 1845, he went to a negro quarter on the defendant's plantation, and about 200 yards from his dwelling house, and there found a quilting going on and dancing by negroes; and that a daughter of the defendant was there at the time, and some of the negroes did not belong there—that he heard the noise of dancing some distance before he reached the house; but that he did not see the defendant nor know that he was at home. Another witness stated that he was once at the defendant's negro quarters, and found more negroes there than belonged to him, and that there was more noise than he had ever heard at any place.

Another witness for the State, named Roberts, deposed that on Christmas night, 1846, he and other patrollers went to the defendant's plantation between 8 and 9 o'clock: that for three-quarters of a mile before he reached the house he heard much noise in that direction; that they went to the negro quarter first and found several negroes dancing there; that they then went to the house in which Boyce lived, and found therein twelve or fifteen negroes, of whom one was fiddling, and the others dancing and talking loud; and that some of them acted as if they were

drunk, and he smelt spirits; that Boyce was in the house, and with him were a neighboring white man named Hollowell, a brother of the defendant, named Baker, and a married daughter of the defendant and her husband, (all of whom were visitors,) and several children of the defendant, who lived with him and were enjoying themselves in the dance with the negroes; that several of the negroes did not belong to Boyce, but they all had papers to go to Boyce's, and yet were whipped by the patrol, except the fiddler, who had been sent there by one of the patrol; that when the patrol seized the negroes to whip them, Goodwin, the defendant's son-in-law, had high words, and got into a fight with the patrol, but the defendant did not interfere.

Another witness for the State, named Simpson, stated that he was one of the patrol who went with Roberts at Christmas, 1846, to the defendant's; that he heard no noise until they got to the defendant's gate, about 200 yards from the houses, and that the defendant resided in a very private situation, not being within a mile of any public road. And another of the patrol stated that they bursted open the door and were in the house before the defendant knew they were on the land; that they immediately began to tie the negroes, when Goodwin remarked to Roberts that a person who acted as he was doing was no better than a negro, and that brought on a fight between them.

On the part of the defendant, Hollowell stated that the defendant, and his children, his brother, son-in-law and daughter, and the witness were sitting quietly in conversation when the patrol broke into the house; that all the negroes belonged to the defendant except four, and that those four had belonged to him and came there by the permission of their owners to pay a Christmas visit to their old master, and their parents and relations, who belonged to the defendant; that some of the negroes were dancing, but they were not drunk, and, indeed, they had no

spirits, and made but little noise; that the defendant permitted the negroes to come into the house to dance one reel for the amusement of his children and visitors, and there was no disorder; and that he had lived within a mile of the defendant for many years, and was familiarly acquainted with the habits of his family, and never knew any disorder there. Baker Boyce gave the same account in substance.

The defendant then called five witnesses, all of whom had for many years, and still, lived near the defendant—some within a quarter, and the furthest within three-quarters of a mile—who stated, that they were at home on Christmas night, 1846, and were not disturbed by, nor did they hear, any noise or tumult at the defendant's; that they had not at any time heard any great noises there or more than is usual in families in the country, and those were upon such occasions as log-rollings or holidays, and that the defendant's household was orderly, peaceable, and quiet.

The court instructed the jury, that, in order to convict the defendant, they must be satisfied, that he had done, or permitted others to do, acts in his house, which violated the public morals, or that he made, or permitted others to make there, such a noise and confusion as annoyed and disturbed the public; that, if they found upon the evidence, that the defendant had upon two or three occasions suffered white persons and negroes, of both sexes, to meet together at his house and fiddle and dance together, and get drunk and make a noise, so as to disturb the public, they should find the defendant guilty; and further, that, if they believed the witnesses for the State, they ought to convict him. The jury accordingly found the defendant guilty, and after sentence he appealed.

*Attorney General*, for the State.
No counsel for the defendant.

RUFFIN, C. J. The conviction seems to be a hard one; and we own, we do not see enough in the evidence to support it. Up to Christmas, 1846, nothing appears to have been done at the defendant's house, tending to the corruption of the public morality. At Christmas, 1845, there was a quilting, as it is called, and dancing by negroes in a negro quarter, accompanied by such noise as arises from a negro dance; and it happened that a daughter of the defendant was seen there and that some of the negroes did not belong to the defendant; but why the daughter went there, or how long she staid, or what she did, or how many strange negroes there were, or that they were unlawfully there, or that there was any drunkenness or drinking, or anything else improper, did not appear. At another time it is stated that negroes not belonging to the defendant were in his negro quarters, and that a very great noise was made. But it is not stated when that was, nor that those negroes were improperly there, nor that it was at an unseasonable hour, nor what was the nature or occasion of the noise. The case is, then, brought down to the affair of Christmas night, 1846; and the question is, whether that constitutes the defendant the keeper or a disorderly house. According to the case of *Mathews*, 2 Dev. and Bat., 424, it does not, as far as the collecting of people and their drinking go; for it was there held, that a private person, living half a mile from any other house and at a distance from a highway, was not guilty of keeping a disorderly house, though on two occasions he took in company for pay, who sat up all night, played cards, and got drunk and committed affrays. The criminality here, then, must consist, if in anything, in the assemblage of negroes and their dancing and thereby making a noise—for no other kind of noise or disorder is suggested—and in the mingling of the two colors together in the same house and dance, as stated by the witness, Roberts. It would really be a source of regret, if, con-

trary to common custom, it were to be denied to slaves, in the intervals between their toils, to indulge in mirthful pastimes, or if it were unlawful for a master to permit them among his slaves, or to admit to the social enjoyment the slaves of others, by their consent. But it is clearly not so. The statute law recognizes the usage, and only forbids under a penalty any person from permitting slaves to meet on his plantation to dance or drink, unless they have the written permission of the owner. When the law tolerates such merry-makings among these people, it must be expected, in the nature of things, that they will not enter into them with the quiet and composure, which distinguish the gaieties of a refined society, but with somewhat of that hearty and boisterous gladsomeness and loud laughs, which are usually displayed in rustic life, even where the peasantry are much in advance of our negroes in the power and habit of restraining the exhibition of a keen sense of such pleasures. One cannot well regard with severity the rude pranks of a laboring race, relaxing itself in frolic, though they may seem to some to be at times somewhat excessive. If slaves would do nothing, tending more to the corruption of their morals or to the annoyance of the whites, than seeking the exhilaration of their simple music and romping dances, they might be set down as an innocent and happy class. We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts, which providence bestows as a blessing on corporeal vigor united to a vacant mind. In the assemblage at the defendant's there seems to have been nothing more; no brawls, no profane swearing, nor other vicious disorder. It was but the dancing in a retired situation of the negroes of the plantation, to which the greater hilarity was probably imparted by the participation of a few others, who had been of the same family, and by the leave of their owners came, at the sea-

son of Christmas, to receive the affections belonging to the ties of kindred and former association. There was nothing contrary to morals or law in all that—adding, as it did, to human enjoyment, without hurt to any one, unless it be that one feel aggrieved that these poor people should for a short space be happy at finding the authority of the master give glace to his benignity, and at being freed from care and filled with gladness. Then, as to the ingredient, that the negroes were allowed to dance in their master's dwelling-house, and that some of the white people also joined in their dance. Taking the testimony for the State altogether, there is much question as to the truth of this last circumstance. But, supposing it to be so, we yet must say, though it be not according to the custom of this part of our country, that there is nothing in it forbidden by law—nothing that, of itself, can constitute a disorderly house. The presence of the family might be a safeguard against riotous conduct in the negroes, rather than authorize the inference, that it contributed to create disorder; and it is very possible, that the children of the family might in Christmas times, without the least impropriety, countenance the festivities of the old servants of the family by witnessing, and even mingling in them. As far as appears, it was but harmless merriment; which, indeed, is the character given to it by the concurring testimony of all those who lived nearest to the defendant, and knew best the nature and periods of these merry-makings.

PER CURIAM. Judgment reversed and a *venire de novo*.

NOAH TRICE, et al. Ex'rs, v. JAMES C. TURRENTINE.

Where a judgment is against several and the sheriff had not taken bail from one, it was not necessary before the act of 1844, ch. 31, it was not necessary to issue a *ca. sa.* against all, to subject the defendant as bail for that one.

Under the act of 1844, ch. 31, it is not necessary to issue a *ca. sa.* at all, in order to subject the bail. That act applies to the remedy only, and not to the contract of the bail.

Where there has been a defective or immaterial pleading, so that the finding of the jury does not determine the right, the court ought to award a repleader, unless it appears upon the whole record, that no manner of pleading the matter could have availed.

The cases of *Arrenton* v. *Jourdan*, 4 Hawks., 98, and *Gray* v. *Hoover*, 4 Dev., 475, cited and approved.

The former case of *Trice* v. *Turrentine*, 5 Ire., 236, overruled.

Appeal from the Superior Court of Law of ORANGE County, at the Fall Term, 1848, his Honor, Judge *Battle*, presiding.

This is a *scire facias* against the sheriff as bail for one King, by reason that he did not return a bail bond. The writ was issued on the 30th of January, 1846, and recites a judgment entered on the 4th Monday of May, 1841, against King and two other persons, named Norfleet and Durham. The defendant pleaded *nul tiel record;* no *ca. sa.* against the principal; and that this suit was not commenced within four years from the said day of rendering the judgment against King and others. The plaintiff took issue on the two first pleas. To the third he replied a former suit against the defendant as bail for King within four years after, &c., to-wit, on, &c., and that he was therein nonsuited on the second Monday of Septem-

ber, 1845, and that this *scire facias* was sued out within less than one year thereafter, to-wit, on, &c. The defendant traversed, that this *scire facias* was sued out within the year, &c., and the plaintiff joined issue thereon.

Upon the trial the court adjudged, that there was such a record. The plaintiff gave in evidence a record of a former suit against the defendant as bail of King, whereby it appeared that the commencement of that suit and the nonsuit therein were of the dates stated in the replication; and the jury found thereon, that this action was commenced within one year after the said nonsuit.

Upon the other issue the plaintiff gave evidence that, in January, 1842, he took out a *ca. sa.* against King, Norfleet, and Durham, and delivered it to the defendant, who returned thereon *nou est inventus* as to King, and that he did not take the bodies of Norfleet and Durham, because he was directed by the plaintiff's attorney not to do so. And evidence was given by the defendant, that he was so directed by the attorney of the plaintiff.

Thereupon the presiding judge, in conformity with the decision of the Supreme Court in the former case, as he understood it, instructed the jury, that the plaintiff had lost his right of action against the defendant, as the bail of King, by failing to proceed on a *ca. sa.* against all the defendants in the original action. And he further gave his opinion to the jury, that the act of 1844, ch. 31, did not help the plaintiff, or enable him to maintain this suit without having issued a *ca. sa.* The jury thereon found, that there was no *ca. sa.*, and there was judgment for the defendant, and the plaintiff appealed.

*Norwood*, *McRae*, *A. W. Venable* and *Iredell*, for the plaintiff.

*H. Waddell*, *Bryan* and *W. H. Haywood*, for the defendant.

RUFFIN, C. J. There was a mistake in supposing, that in the former case of *Trice* v. *Turrentine*, 5 Iredell, 236, this Court held that the plaintiff was barred of any action against the defendant, because he had not proceeded properly on a *ca. sa.* before that suit was commenced. All the Court could then decide was, that the plaintiff, for that reason, could not maintain that suit. But it was never supposed, that the plaintiff might not by a proper *ca. sa.* entitle himself thereafter to a *scire facias* against the defendant, on which he could have judgment. That case, however, after having been sent back with an order for a *venire de novo*, terminated in a nonsuit; and then the present suit was commenced without any further *ca. sa.* The question is, can it be maintained? The plaintiff insists, upon two grounds, that it can. The one is, that, notwithstanding the opinion formerly given to the contrary, the *ca sa.*, which was issued, was sufficient, as the law then stood; and the second is, that no *ca. sa.* is necessary, as the law stood when this suit was brought and now stands. The Court has bestowed much consideration on both points, and has come to a conclusion favorable to the plaintiff on each of them.

On the first, the Court, in the case of *Jackson* v. *Hampson*, at this Term, has said all that is necessary. For the reasons there given, the Court holds, that the *ca. sa.* and the return were sufficient to charge the defendant as bail for King; and therefore the plaintiff would be entitled to a *venire de novo* for error in the instruction as to that issue.

The second point arises under the act of 1844, to which his Honor referred. It enacts in the first section, "that hereafter no *capias ad satisfaciendum* shall issue upon any judgment, unless upon affidavit that the defendant has property sufficient to pay the debt, which cannot be reached by a *fieri facias*," &c. The second section is, "that no court shall permit an issue of fraud to be made up and

tried under the act for the relief of insolvent debtors, unless the creditor shall make an affidavit, in writing, of his belief of the alleged fraud or concealment, and specify the particulars thereof." And the third enacts, "that whenever a plaintiff shall be desirous of subjecting the bail of a defendant in any judgment to the payment thereof, he shall be at liberty to proceed in the first instance by *scire facias* against the bail, without having previously issued a *capias ad satisfaciendum* against the defendant, but that the suit shall not stand for trial at the appearance term."

The first question is, whether the statute operated immediately on contracts and judgments then existing, or only on such as should be made or rendered afterwards. There is a natural presumption, that statutes are meant to operate prospectively; and, as far as they affect rights to things or of person they can, by one fundamental law, have no other operation. But remedial acts, such as promote repose, enforce existing obligations by curing defects in existing remedies or adding a new one, are entitled to a benign interpretation, so as to give to every one the benefit of them at once. At all events, there is no ground for denying to their terms their full force, by excluding from their operation any case or person covered by the language. The terms of this act leave no doubt of the intention, that it should have full effect in all cases from its passing. The first section by the words "hereafter" and "any judgments," includes all judgments, rendered or to be rendered, and denies thereafter a *ca. sa.* thereon, except upon the conditions prescribed. It was the purpose of the act, that a creditor should not have the process of a *ca. sa.*, as a part of his remedy, unless he could show by affidavit that it was probable that process would produce satisfaction. That writ was to be used as a remedy for raising the money, and not solely as a punishment on the debtor. This is the legitimate and moral

purpose of the writ, in view of the legislature, and hence it was then enacted, that "hereafter" it should not be used for any other. The second section speaks as plainly, that no court shall permit an issue of fraud to be made up, so as to keep the debtor in jail or on bonds, unless the creditor could state a probable cause to change it, by setting forth some particular fraud and by swearing to his belief of it. Both of those sections might reasonably go into effect at once; and, since that is so, and their words authorize it, the Court must put that construction on them. It is believed, indeed, that no one has doubted the correctness of the construction; for, up to the present time, no attempt has been made to take out a *ca. sa.* upon any judgment, though then existing, without an affidavit. The third section was, obviously, produced by the first. The act of 1777 required a *ca. sa.* before proceeding against bail; and, after enacting that a plaintiff should not have a *ca. sa.*, but upon affidavit, it occurred to the writer of the act of 1844 that the remedy against bail might be injuriously impaired thereby. Therefore the provision was inserted, that without any affidavit, and without any *ca. sa.*, the creditor should have his action against the bail at once. Hence the construction seems necessary, that the creditor was to be at liberty to go thus against the bail, in whatever case the *ca. sa.* was denied to him by the previous section; and as that has been shown to be immediately, and in all cases, except upon affidavit, it follows that all bail may be thus sued immediately. And with that agree the words of the third section: for they are, "whenever"—at whatsoever time now or hereafter—"a plaintiff," that is, any plaintiff, "shall be desirous," &c., he may have his *scire facias* at once.

It is said, however, that if the act be thus construed, it violates a vested right of the bail to have a previous *ca. sa.*, and therefore that the legislature had not the constitutional power to pass it. The Court concurs in the position that

the legislature cannot *inter partes* divest a right. But this act, as the Court thinks, has no such purpose or effect. It operates on the remedy against the defendants and their bail, and that only, and without in the least impairing the obligation of the contract between the bail and the creditor, or adding to its terms, or touching a vested right. It has been so often said that there can be no vested right in a remedy, and that the legislature hath authority to abrogate or modify remedies, or create new ones, that no authority need be cited therefor. It is established everywhere in this country. The only question in such cases is, whether the act operates upon the remedy, or, under that guise, annuls contracts or destroys rights. If a statute take away all remedy for an acknowledged right or on contracts of a certain description, which were lawful when made, the Court, however reluctantly, would be obliged to say that the legislative power had been transcended; for, without some remedy, contracts would, in truth, have no legal obligation, and rights no value. But what particular remedy shall lie in each case; whether it shall be more or less direct or expeditious, within what period it shall be prosecuted, and with or without what reasonable guards against abuses of different modes of proceeding; and many other matters of the like kind, are all proper subjects of legislative discretion, and, of course, the will of the law-makers is binding on the citizen. An action of assumpsit, for example, may be given on an existing contract, on which debt only laid before or *vice versa;* as where assumpsit was given to the assignee of a bond against the obligor, or debt to the assignee against the maker of a note. So reasonable statutes of limitation have been held to apply to actions on contracts, entered into before the law passed. So, a statute may prohibit certain pleas, unless verified by the party's oath. The legislature might, no doubt, on the other hand, give the remedy by an attachment on an existing

contract without an affidavit to the debt or the absconding or foreign residence of the debtor: or might require an affidavit of debt or of a purpose to abscond as a prerequisite to holding a defendant in an ordinary action to bail. The policy of such enactments might, in many cases, be doubtful. But the power to make them, as long as they are limited to the method of proceeding, cannot be denied, nor, indeed, the usefulness of the exercise of the power in many cases. The act under consideration seems to be one of that kind purely. The whole scope of it is to regulate the remedy against the bodies of the defendants in judgments, and that against their bail. There is nothing else within the purview. It does not in the least touch the contract of the bail, or give the creditor a right against the bail, which he had not before. What is the contract of bail in our law? It is an obligation entered into by the bail with the principal in double the sum for which the defendant in a writ is held in arrest, payable to the sheriff by his name of office and assignable by him to the plaintiff, and dischargeable upon the prisoner's appearance and rendering himself at the day and place required in the writ, and his sureties discharging themselves therefrom as special bail of such prisoner. Rev Stat., ch. 10, sec. 1–2, and ch. 109, sec. 19. That is the whole contract, as set forth in the statutes. It is a conditional contract and not an absolute engagement by the bail to pay the debt; and clearly, the legislature cannot convert it into an absolute obligation by other means than the non-performance of the conditions in it. Those conditions are such as render the contract of the bail, in substance, that of bail to the sheriff and bail to the action in England. They are, that the bond shall be forfeited, unless the defendant shall appear to the action or unless the sureties shall discharge themselves as special bail. The provision for the discharge of the bail obviously refers to the terms of the engagement at common law of special bail or bail above, as they are

indifferently called. Those are, that, if the defendant be condemned in the action, he shall pay the condemnation money or render himself a prisoner for the same, or, if he fail to do so, the bail undertake to do it for him. 3 Blk. Com., 291, appen. III., sec. 5; Archb. Pr., 102; 1 Sellon's Pr., 150. That is the whole contract in England, and the only difference between the contract of the bail there and here, is in the form merely; it being there by recognizance or bail price, as it is called, and here by bond given to the sheriff, as being the more convenient mode, instead of requiring the party to carry his bail to any and every court in the state. Now, there is, certainly, nothing in the act of 1844, which interferes with that contract, either in its terms or its spirit. By the act of 1777, which prescribed that form of a bail's engagement, it was further provided, in favor of the defendants and their bail, that the latter might, under that contract, discharge themselves, not merely by rendering the principal at the day of condemnation, but at any time before judgment against the bail—thus extending the time for the performance of the condition. It is agreed, that a bond entered into in that state of the law cannot be effected by a subsequent statute, which would deprive the bail of the right thus to render the principal; for that is a part of the contract, as it enters into the condition. But in respect of the remedy, which the creditor is to have against the bail for failing to pay the condemnation or to render the principal at all, the matter is different; and it is under the control of the legislature. It might, for example, be enacted, that the debt or covenant might be brought on the bond, instead of a *scire facias*. So, instead of issuing a *ca. sa.* it might be provided, that the creditor should make a personal demand on the bail to render the principal; or instead of one *ca. sa.* there should be two; or, as here, that none should be necessary. That a provision for a *ca. sa.* is not a part of the con-

tract, but a mere regulation of the remedy, is clear, from the fact that a *ca. sa.* need not be set forth in the *scire facias* or declaration, but it is matter of defense to the action merely. *Arrenton* v. *Jourdon*, 4 Hawks., 98; *Gray* v. *Hoover*, 4 Dev., 475. It was argued, indeed, that the contract was entered into in reference to the law then regulating the remedy, and therefore it ought to be regarded as incorporating those provisions of the law But that is arguing in a circle, and amounts to a denial, in another form, of the legislative power to modify remedies in any case. Persons may, indeed, be supposed to enter into contracts in reference to the existing remedy on them. But that is not of the essence of the contract, and can only be supposed to have such reference to the remedy as being likely to continue, indeed, but, still, as being subject to the constitutional power of the legislature to change it. Upon the whole, therefore, the court holds, that the act of 1844 gives the plaintiff this suit, without a previous *ca. sa.;* and, consequently, as far as that matter goes, that the plaintiff would be entitled to judgment *non obstante veridicto*, that there was no *ca. sa.*

But the state of the pleadings upon the statute of limitations is such, that the plaintiff cannot have judgment on them and the verdict rendered thereon. The proviso in the act of 1715 gives, after an arrest of judgment or a non-suit in either of the action therein mentionad, one year to commence a new suit. But it is confined to those actions, and has nothing to do with the limitation to actions against bail. That is created by a subsequent statute, which has different provisions on this subject; 1831 ch. 18. It makes four years after the judgment rendered against the principal a bar to the suit against the bail, with several provisos, however; of which one is, that, if the plaintiff shall sue his *sci. fa.* and be therein nonsuited, the time which elapsed between the day of issuing that *sci. fa.* and the nonsuit, shall not be reckoned

as a part of the four years. It is plain, then, that the matter replied here, and on which the defendant took issue, namely, that this suit was brought within a year after a nonsuit in a former suit, and the verdict thereon does not in the least inform the Court, whether this suit was or was not brought within four years after the judgment against the principal, or, if it was, whether there were still four years, after deducting the time the former suit pended. The matter of the issue is, in truth, totally immaterial, and the bar alleged by the defendant has not been effectually passed on. The plaintiff cannot therefore have judgment; but there must be a repleader, by setting aside the defendant's rejoinder and the plaintiff's replication to the plea of the statute of limitations—thus going back to the first fault, which is the rule in such cases. The manner of doing so appears in *Jefferson* v. *Morton*, 2 Saund., 19. The counsel for the defendant insisted, indeed, that there ought not to be a repleader, because without it the plaintiff cannot have judgment, and, because it is not grantable in favor of the party who made the first fault in the pleadings. The position as stated, is true in part only, and is misapplied in the argument. The rule really is, that if the verdict on the immaterial issue be given against him, who made the first fault, no repleader shall be granted: but otherwise, if it pass for him. It is so laid down in *Kemp* v. *Crews*, 1 L. Ray., 167, and by Mr. Justice BULLER in *Webster* v. *Bannister*, 1 Doung. 393, and was acted on in *Tryon* v. *Carter*, 2 Str., 994, and in divers other cases. The reason of the distinction is to prevent parties from falsely alleging immaterial matter, and thereby increasing the delays and expenses of litigation. If, after the party has had the immeterial issue formed against him, enough does not appear in the record to authorize judgment for him, he cannot have it, nor can he be entitled to make the other party condescend to a better issue. But if it be

found for him, it is thereby shown that his fault was not in an attempt to palm a falsehood on the court, but consisted in a mistake of the law merely; and, then, as in the case of a plea in abatement overruled on demurrer, it is allowed to the party to make up an issue on the point in controversy, which will bring the suit to a determination on the merits. In such a case the court awards a repleader for its own sake, that it may be seen for which side the judgment ought to be given. 2 Tidd's Pr. 922, Tronbat's Edit, 2 Wms. Saund., 319 b. For the rule is as laid down by Lord MANSFIELD in *Rex* v. *Phillips*, 1 Bur., 292, that, when the finding does not determine the right, the court ought to award a repleader, unless it appear upon the whole record, that no manner of pleading the matter could have availed. Here the verdict is for the plaintiff, and therefore he ought *prima facie* to have judgment. It is the defendant, who says there can be no judgment, because the issue was immaterial and the merits are not determined. Now the consequence of that is not, that the defendant ought to have judgment, but that such an issue shall be taken as will bring the cause to a decision on the merits in fact and law. That can only be done by a repleader in the manner above mentioned, and it was error in the superior court not to have awarded it. *Staple* v. *Hayden*, 2 Salk., 579. The judgment must therefore be reversed and the cause remanded with directions to award a repleader, and then a *venire de novo*.

PER CURIAM. Judgment accordingly.

HOWELL WISWALL v. HIRON BRINSON.

Where A. made a contract with B. that the latter should, for a stipulated sum remove a house belonging to the former from one side of a street to the other side, and B. performed his work so negligently, as to cause an injury to C.; *Held*, by PEARSON and NASH, J., Chief Justice RUFFIN dissenting, that A. was liable to C. for the damage he had sustained.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1847, his Honor, Judge *Pearson*, presiding.

This was an action of trespass on the case.

The defendant, wishing to have a house moved from the lot, on which it stood in the town of Newbern, to a lot of his own across the street, about 200 yards distant, agreed to give one Gaskill $81 to move it, Gaskill to be at the expense of providing hands, &c. After the house was rolled into the street, Gaskill dug a hole in the ground, about the middle of the street, eighteen inches deep, to fix an anchor, for the purpose of turning the house, and neglected to fill it up. The night after, as the plaintiff was driving his stage, one of the horses stepped into the hole and was injured. The defendant had nothing to do with the operation of moving the house, and did not at all interfere. He resided in town and was present several times, but was a mere "looker-on." It was admitted, that Gaskill was guilty of negligence, and the only question was whether the action could be maintained against the defendant.

Under the instructions of the court the jury found a verdict for the plaintiff, and from the judgment thereon, the defendant appealed.

*Stanly*, for the plaintiff.
*Donnell*, for the defendant.

PEARSON, J. The question is one of serious difficulty, and has been held under advisement. The cases upon the subject are numerous. Many of them turn upon very nice distinctions; and in some, the judges were not able to agree. After the most anxious consideration, I have come to the conclusion, that the action can be maintained, both upon authority and principle.

"One should use his own, so as not to injure another;" "that, which you do by another, you do yourself,"—are two maxims, from which results the general rule, when one procures work to be done, if a third person is injured by the negligence or want of skill of the persons employed, the person, for whose benefit, and at whose instance the work is done, must make compensation. The party injured may sue the person, whose negligence or want of skill was the immediate cause of the injury. So may the employer, if he is compelled to pay the damage. But, if that person is innocent, the loss must fall either upon the party injured, or upon the party, who set the work in motion and for whose benefit it was done. Can there be a doubt, upon which of the two it ought to fall? The rule is founded upon justice, and exceptions to it should be allowed with caution, and only to the extent called for by public convenience.

The rule is not confined to domestic servants, but has a more extended operation. All such as act for—do the work of—*serve*, another, are in contemplation of law his *servants*, and fall under the rule. The captain and crew of a vessel or steamboat, engineer and hands of a railroad, or of a factory, drivers of stages, cashier and officers of banks, the deputies and other officers of a sheriff, are familiar instances. It makes no difference, whether these servants are paid by the job, or by the year, or the day. A

third person has no concern with the terms of their private agreement. The loss to him is the same, let the agreement be either way. Nor does it make any difference, whether the person, for whom the work is done, be present or absent: if he expects to be absent, the more care should be used in making the selection. Nor is any distinction taken, when the work is of such a nature, that the owner cannot be expected to do it himself and must necessarily employ others to do it. In all these cases, the person, for whom the work s done, is liable, if a third person be injured. There is, however, an exception to the generality of the rule, made necessary by public convenience and general usage and when the reason of the rule does not so fully apply. The question is, whether this case is within the exception.

When one enters a railroad car, the engineer and hands serve him—do work for him—carry him and his goods. But he is not liable for their negligence or want of skill. So far from it, the company is liable to him. This is an exception to the rule, for two reasons: he did not make the selection, and although in a large sense they are his servants, yet they are the servants of the company. It carries on a distinct, independent business, and is liable for their negligence or want of skill. The reason of the rule fails; and public convenience demands, that the party injured should be content with his remedy against the company or the individual whose fault caused the injury. If passengers were liable no one would travel upon railroads. This is the principle, upon which the exception is based. It extends to an infinite variety of cases. The one given is "*ex grege*"—it includes all who carry on independent trades or callings recognized as such by law or by common usage. If one sends his horse to a smith's shop, and by negligence he is permitted to injure a third person, the owner of the shop is liable, but the owner of the horse is not. So, if one sends to a person, whose

calling is to keep horses, carriages and drivers to hire, and a third person is injured by the negligence of the driver, viciousness of the horse, or insufficiency of the carriage, he must look to the person, who, in his calling, furnished the driver, horse, or carriage. The person who hired them did not have the selection; and public convenience requires, that he shall not be vexed for the fault of another, although the work was done for his benefit, as there is another, to whom the party injured may have recourse. So, if a vessel takes in a pilot, not being compelled to do so, the owner is liable, but if a vessel is compelled to take in a pilot, the owner is not liable to a third person for his fault, because there is no power of selection, and the party injured has a sufficient remedy against the pilot. This exception, however, was not yielded without much opposition. In England, it was not quite settled until the statute George 4th, excepting ship-owners from liability in such cases; and, in this state, in the case of *Parvey* v. *Pike*, N. C. Term Rep., 82, it was held, that the owner of a ship is liable upon the *bill of lading* to the shipper, whose goods are damaged by the unskillfulness of the pilot. But it is left open, whether a ship-owner be liable to third persons. This shows the caution and reluctance of the courts in admitting exceptions to a rule, so obviously founded upon justice. Such is the rule, and such the exception as now settled, but the exception was not permitted to be as large as I have laid it down, until after many and severe struggles. One of the most memorable occurred in the case of *Laugher* v. *Pointer*, 5 B. & C., 547. The judges of the king's bench were equally divided. The case was then argued before the twelve judges. They could not agree, and the judgment was then delivered by the four judges of the king's bench, LITTLEDALE and ABBOTT, C. J., being with the defendant, HOLROYD and BAILEY, with the plaintiff. The argument, as may well be supposed, was exhausted on both sides.

and it was left as an unsettled question. The case was, the defendant, having a carriage in London, sent to a job man, who kept horses, carriages and drivers to hire, in the usual way, for a pair of horses. The job man sent the horses and a driver. The plaintiff was injured by the negligence of the driver, and the question was, whether the defendant was liable. LITTLEDALE held, that he was not, and argued, that the case fell under the exception to the general rule, because the defendant did not select the driver, and because the plaintiff had his remedy against the job man, "who carried on a *separate, independent calling*, recognized by common usage." HOLROYD and BAILEY held, that the case fell under the general rule, that the defendant had made the selection; for, he allowed the job man, as his agent, to select the driver, which was the same as if he had made the selection himself, and if the plaintiff had a remedy against the job man, it was no reason why he should not also have a remedy against the defendant, for whom the work was done, and let him look to the job man. They assume, that, if the job man had been the driver, instead of the person sent by him, the case would have been clear, for the plaintiff; for, then, there would have been no other person to sue, save the person whose fault caused the injury, and the defendant, for whose benefit the work was done, and insist that his sending a driver, instead of coming himself, made no difference. ABBOTT concludes the argument, contending that the case was the same, as if the job man had also furnished the carriage, which would be the ordinary case of one, riding in a stage or hack. He insists, that the job man exercised a separate calling and was liable for the negligence of his servant, the driver; that he was as able to pay the damage and as easily found out as the hirer, and there was no reason, why the hirer should also be liable. Public convenience was against it. He does not answer the supposed case, had the job man been the

driver; and it is worthy of remark, that in all the cases where an exception is made, the agent was the servant of the person with whom the contract was made, and not that person himself; and there is no intimation, how the judges thought this circumstance would alter the case. I do not lay stress upon it, as it does not seem to me to make much difference, whether the person, who carries on a distinct trade, does the work himself or has it done by his servants. But in the next case, which will be referred to, which is the strongest on the side of the exception, and has been said "to carry it to a great extent," the decision is put upon the fact, that the work was done, not by the person, with whom the contract was made, but by *his servant.*

*Laugher* v. *Pointer*, was followed by the case of *Quarman* v. *Burnett*, in the court of exchequer, 6 M. & W., 499. The facts were almost precisely the same; and PARKE, B. says, the Court is compelled to decide the question left unsettled in that case. The decision is for the defendant, concurring with the opinion of LITTLEDALE and ABBOTT. He says, "no other person than the master can be liable, on the simple ground, that the servant is the servant of another and his act the act of another; consequently, a third person, entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable;" and concludes that when the job man sends the driver, the employer is not liable, for the driver is the servant of the job man, not of the employer, and that the general rule is too broad, and the case falls within the exception. This case established the exception to this extent:—when the work is done by the servant of another, who exercises a distinct and independent calling, the latter is liable for the fault of *his* servant, and not the person, for whom the work is done, because a contract with the master does not establish the relation of master and servant between

the employer and the servant of the contractor. For instance, a contract with the job man does not make his servant the servant of the employer. A contract with a railroad company does not make the engineer and hands the servants of the traveler. They are selected and paid by the company, and its liability for their acts is a sufficient security to third persons, without subjecting the passengers, which would be a great public convenience.

The next is the case of *Repson* v. *Cebitt*, 9 M. & W., 710. The owner of a house employed a builder to do certain repairs. He made a subcontract with a gas-fitter. The gas-fitter, or his servant, in the erection of the gas-fittings, caused mischief by neglect. It was held, that the owner of the house was liable, upon the authority of *Burk* v. *Stinman*, (which is cited below,) but that the builder was not liable, because the gas-fitter was carrying on an independent trade and was not the servant of the builder, but was doing the work of the owner of the house.

The next was the case of *Milligan* v. *Wedge*, 12 A. & E., 737. A butcher, having bought a steer, employed a *licensed* drover in London to drive the animal to his slaughter pen. The drover sent his servant to do the work. Injury was done to the plaintiff by the negligence of the servant. Held, that the butcher was not liable; for the servant was the servant of the drover, who *carried on a separate calling* recognized by law. The plaintiff's remedy was against the drover.

Then came the case of *Martin* v. *Tenpuly*, 4 A. & E., N. S., 45 E. C. L. R., 298, decided in 1843. The defendant owned two barges, which he wished to remove from one place to another on the river Thames. His foreman employed two freemen of the company of "Watermen," &c., and paid them *by the job*. In moving the barges, injury was done to the plaintiff's boat by their negligence. The defendant's counsel admitted the general rule, but

urged, that he came within the exception, established by *Quarman* v. *Burnett*, and *Milligan* v. *Wedge;* for, the freemen of the company of "Watermen," &c., have a distinct calling recognized by law, and the defendant was obliged to employ a member of that company by statute, George 4, so his choice of selection was limited. And without reference to the statute, it was argued, that it was not a case of master and servant, but of an *independent contract* to do work within the principle of those two cases. Judgment was given for the plaintiff, all of the judges holding, that the general rule applied. DENMAN distinguished it from the case of *Milligan* v. *Wedge*, because the drover was pursuing a separate business, and *his* servant caused the injury. "In the present case, it was otherwise," says his Lordship. He does not pursue the argument, but leaves it to be inferred, that his meaning was, the two freemen were the servants of the defendant; for, if not, whose servants were they? PATTERSON says, "the freemen were the servants of the defendant. In *Quarman* v. *Burnett*, it was held, that where a man hires another man's servant, he does not become the servant of the person so hiring. That case certainly carried the *exception a great way*. But, then, the servant was ordinarily in the employment of one, who hired horses along with the driver, which distinguishes it from this case." COLERIDGE put the case under the general rule, thinking clearly it did not come under the exception. If a man be employed by the job to move a barge from one place to another, and injury is done by his negligence, the owner of the barge is liable. I confess, I cannot distinguish that case from the present, where a man was employed by the job to move a house from one place to another. It cannot be said, that Gaskill was the servant of another, who was liable, which is the principle in the case of *Quarman* v. *Burnett*. Nor can it be said, that he was exercising a separate and inde-

pendent calling, recognized by law or common usage—the principle of *Milligan* v. *Wedge*. The case does not state, that there is such a separate calling, as that of a house mover, and, if so, that Gaskill was of that trade.

Upon authority, therefore, I think, the case is against the defendant, and it is also upon principle. Why take this case out of the general rule? He selected his man; the work was done for his benefit; and he can be indemnified by the person he employed, unless he be insolvent; and if so, it was his folly to employ an insolvent man, and the loss should not be shifted off upon an innocent third person. There is no principle of public convenience, which calls for the exception. If, instead of employing Gaskill by the job, the defendant had given him $10 to superintend; and had given him fifty hands to work under him, it must be admitted, the defendant would then have been liable. Does it make any difference to the plaintiff, how the defendant chose to make his bargain? Is the injury to him less? Then, how can his right be affected by it?

There is another class of cases, to which it is proper to refer. Not because I consider them directly in point, but because they show clearly within what narrow limits the exception is confined. In *Burk* v. *Stinman*, 1 B. and Pul., 404, the defendant, having purchased a house on the road side, contracted with a surveyor to put it in repair for a stated sum. The surveyor contracted with a carpenter to do the whole work. He made a contract with a brick-layer to do the brick-work. And the brick-layer contracted with a lime-burner to furnish a quantity of lime, which was delivered by the servant of the latter, by laying it on the road *near* the house. The plaintiff ran on the lime and upset, and was much injured. Held, that the defendant was liable for the injury. The Court lays down the general rule and the exception, but this is made an exception to the exception, because the property of the defendant was

fixed and permanent; and he was, therefore, liable for the acts of the servants of all such, as he employed to do work upon, *near* or *in respect* to, the property, although the person contracted with carried on a distinct calling. In *Laugher* v. *Pointer*, LITTLEDALE takes distinction between the owner of fixed and of moveable property. This case has been followed by many others, both in England and the United States; and the exception to the exception against the owner of fixed property, is fully established.

In this case, the defendant was owner of the lot, to which the house was to be removed. The work was certainly to be done "in respect to that property," by putting a house on it, and the hole in the street was near the lot (150 yards). It is not stated in *Burk* v. *Stinman*, how *near* the line was laid to the defendant's premises. I infer, that it was within a few yards, and am inclined to think, that the principle of that case is confined to acts done *on* the land, or so *near to it*, that the owner, if present, as he ought to be, must necessarily be aware of them. One hundred and fifty yards seems to be too far, unless the nature of the work makes a difference. Moving a house is a more serious job, and calls for more caution, than hauling a load of lime or timber. I prefer to put the case, not as coming within the exception to the exception, but as coming under the general rule—not being brought within the exception by any decided case in the demand of public convenience.

NASH, J., concurred.

RUFFIN, C. J., *dissentiente*. I find it established as a rule of law, that the possessor of real property is liable for any injury received by reason of a nuisance on or at his premises, whether the nuisance be caused by himself, or his servants, or by persons contracting to do work for

him on the premises. The propriety of the rule is easily understood, in respect of the owner, and his own servants, in the ordinary sense of the term. In respect to contractors to make improvements, it is not so obvious. I must say, with Chief Justice EYRE, that I should have had great difficulty in discovering the principle, which creates a liability of the owner of property for the negligence of persons, who contract with him to do work on it by the job and not under his particular direction. But the principle is settled, and in the case of *Burk* v. *Stinman*, 1 Bos. & Pul., 405, it was put on the ground, that the owner of real property is bound not to suffer even contractors to do anything on his premises, for his benefit, which may work a prejudice to other persons. Hence it was held, that, as laying materials in the street, which were to be used in building a house on the adjacent land of the defendant, would be a nuisance, if done by the defendant or by his family, which would render the owner responsible for any injury occasioned by it, so it would also, if done by one, who contracted for a certain sum to build the house out and out. Mr. Justice ROOKE said, that one, who has work going on upon his own premises, must be civilly liable for the acts of those whom he employs there; and it will be intended that he has a control over the persons who work on his premises, and, if he deprive himself of it, he cannot be permitted to screen himself thereby from an action. It will be at once perceived, that the liability, thus stated, does not arise from considering the contractor as the servant of the owner; for, if that had been the ground, it would have depended on the common maxim of *respondeat superior*. But the Chief Justice said expressly that the relation of master and servant, as commonly exemplified, was not sufficient; and then he adds, that a general proposition, that a person shall be answerable for any injury, which arises in carrying into execution that which

he has employed another to do, seems to be too large and loose. Mr. Justice HEATH, likewise, particularly repudiates the idea, that the liability of the land-holder grew out of a relation of master and servant between himself and his builder. Hence the whole court places his responsibility on the single ground, that every owner of real estate is bound to prevent nuisances on his premises, which are created in the course of doing work there for him by anybody or on any terms; for he has no more right to allow others to erect nuisances on his premises than to do so himself. That is the doctrine of that case, which is the leading one on this subject. But it has been distinctly stated, and adopted by almost every eminent modern judge in England. In *Laugher* v. *Pointer*, 5 Barn. & Cres., 547, Mr. Justice LITTLEDALE treats the liability of one for the acts of another, whom he hires to do a job, as peculiar to such work as is done on real property. As to such property, he admits, that one in possession must have the property so managed as not to injure others, whether it be managed by his own immediate servants, or by contractors or their servants; and he assigns the same reason, that the wrong is in the nature of a nuisance, for which the occupier ought to be liable, when occasioned by the acts of persons, whom he brings on the premises; he, too, excluding the idea, that the contractor, as such, is the servant of the proprietor of the house under repair or being built. And that learned judge contradistinguishes the doctrine as to the personalty from that stated in respect to the realty in a most striking manner. He says movable property is sent out into the world by the owner, to be conducted by other persons. The common intercourse of mankind does not make a man or his own servants always accompany his property of that kind, and he must in many cases confide the care of it to others, who are not his servants, but whose employment it is to take care of it—as carriers, factors, and the like, Chief Justice ABBOTT said

also that the owner of a mine of a house was liable for what was done by persons immediately or mediately employed by him in working on them, because the owner has the control and management of all that belongs to the mine or house, and therefore it was his fault not to exert his authority, so as to prevent a nuisance, to the injury of another. Baron PARKE quoted those positions, almost literally, in delivering the opinion of the court of exchequer in *Quarman* v. *Burnett*, 6 M. & W., 499; and again in *Rapson* v. *Corbett*, 9 M. & W., 710, he states the doctrine thus: "that if a man has anything done on his own premises, he must take care to injure no man in the mode of conducting the work." There are other cases to the same effect; but more need not be quoted on this point. Those cited sufficiently show the proposition before stated, that the owner of real estate is liable for all the nuisances erected on it, not only by one who stands towards him in the relation of a servant, but also by one in the relation of a contractor to do a job of work on the land.

But I deduce clearly from those cases, and venture to lay it down as a necessary part of this doctrine, that, if one contract with another to build him a house on his land, whatever is done in collecting materials, or hewing stone, or framing timber, or making any other preparations for the building by the contractor, at a distance from the place, where the house is to be erected and not at all on the premises of him, for whom the work is to be done, the latter cannot be held liable for a nuisance caused by his builder at the distant point, at which he carried on his preparations. Before the things are carried to their destined spot—that is, while they are not "on the premises" —the proprietor of the land cannot be liable, within the principle of those decisions. It is only *on* his premises that the owner has "that control and management," by reason of which the law deems it *his* fault to allow of an injury

to any one *there*. Take the case of *Burk* v. *Stinman*, to exemplify the distinction. A quantity of material was to be brought by persons employed under a man with whom the defendant bargained for the building, out and out, of a house by the road side, and it was laid in the road near the place, and a carriage was upset by it and the persons hurt; and the owner of the land was held liable upon the ground before stated, namely, that the damage arose from a nuisance created at his premises for his benefit. But, suppose that, instead of the materials being carried to the premises and laid there, the carters, in bringing them towards the place, had, a mile off, negligently driven against a passenger, or willfully thrown down their loads in the road and a coach had run over the heap: it may, as it seems to me, be deemed certain that neither of the judges, whose opinions have been quoted, would have subjected the owner of the land on which the house was to be built. I cannot perceive the slightest pretense on earth for his liability. One can be at one's own house or place, so as to prevent or abate any nuisance there; and therefore the law may enjoin it on one to do so, upon the maxim, *sic utere tuo, ut alienum non lædas*. But by no possibility can one be at all those places, where all the persons, whom one may be under the necessity of employing about personal matters, may happen from time to time to be, so as to correct their misdoings. Indeed, the employer would have no authority over them; and the law cannot intend that he must go away from his own premises to look after people who contracted to bring him the materials he wanted. Until they be placed on his premises, or at the place whence they are to be taken for application directly to the building, they are not the materials of the land owner nor to any purpose *sub potestate ejus*. If *Burk* v. *Stinman* had been that case, we may be at no loss to say that the judgment would have been for the defendant. Now, the present case seems to be just the one supposed.

The defendant had a building two hundred yards off and contracted with another man for a round sum to remove it to the defendant's lot—the contractor to be at all the expense, and to have the exclusive management of the job; and the contractor, having moved the house from the land on which it formerly stood (which did not belong to the defendant,) and got the house into the street, committed a nuisance by digging a hole in the street, at a distance of nearly two hundred yards from the defendant's ground. That is the case, and the question is, whether the employer is liable for *that* nuisance? I may be mistaken, but I entertain a very decided opinion that he ought not to be. It is plain that it is not within the class of cases of which I have been speaking; for the wrong was not done on the defendant's premises, nor near them, nor in respect of them, but was done at a considerable distance, and about a purely personal chattel. Therefore *Burk* v. *Stinman*, and all its derivatives, are inapplicable here; or, rather, upon their reasoning, they show negatively, but conclusively, that the defendant is not liable. But, furthermore, if the defendant was present when the hole was dug in the street—as it seems he probably was—it can make no difference; for he had no authority over the contractor, nor power to give a single order. In other words, the contractor was acting independently for himself, under an agreement to do the work, and not as the servant of the defendant.

That brings me to another ground, on which it is supposed a liability of the defendant may be raised; which is, that the relation between those parties is that of master and servant. In the arguments at the bar the counsel confined their observations entirely to the point I have been considering, and did not suggest the other, of master and servant. Therefore I did not turn my attention to it until recently. But I confess my researches and reflections lead me to a very clear opinion on it also, in favor

of the defendant. I admit, of course, the liability of a master for the injuries done by his servant in the course of his employment. But two persons must first be master and servant, before there can be a responsibility on one for the acts or omission of the other. The question is, what makes them so—what constitutes that relation? I own, it is new to me, that, in a legal sense, so as to create responsibilities of the one for the other, the procuring of work to be done for one by another creates that relation, so that, if, by the negligence or want of skill of the latter in doing the work, a third person is injured, then the person, at whose instance the work is done, shall answer for the injury. My notion has been, that the point depended upon the manner, in which the workman was employed—whether, as the servant of the employer, or under an independent contract, by which the parties remain *in equali jure*. In other words, that the rule, that a man shall be liable for his own servant, applies only to a servant; and, therefore, the first thing, always, is to show that the relation subsists. Now, what are the characteristics of that relation—how do we know when two men are master and servant? I admit that the mode of compensation, merely, does not determine the question conclusively; for a servant may be paid by the year, month, day, or job; though the mode may help, with other things, to show how the parties themselves regard each other. But there is a certain method of distinguishing a servant, of any kind, from persons *sui juris*—which is, by knowing whether the person employed is subject to the orders and control of the employer in the execution of the work he is to do, or not. If the employer has a right to have the work done as he pleases, can change the plans and periods of it from time to time, to suit his fancy or his other business—in fine, if the hired man works *under* the other—then one is master, and the other is servant; but, otherwise, not. Hence, officers of companies, hands

on cars or ships, deputies as well as menials and domestics, are properly and truly servants. They are under the direction of the superior, and therefore the superior answers for them. But those officers and hands, or any other carrier, whether a head or subordinate, are not the servants of one, whom or whose goods they carry. Why? Because they do their work, not under the control of the passenger or freighter, but they are guided by some other superior or go their own way. So it is, as between all other persons, who employ and are employed. In the cases hitherto cited that view is taken of this point. In *Burk* v. *Stinman*, HEATH, J., admitted distinctly, that the persons, who hauled the lime, were not the defendant's servants, although doing work for him on his premises; but he said, the action did not depend on that relation, and the defendant was liable, though the others were not his servants. Why was he not their master? Obviously because they did not work under him. They were the servants of a contractor, who had undertaken to build the house. He was, therefore, not the servant of the defendant, and, of course, his servants were not; but they were the servants of their own master. It will be remembered, that in the passage already quoted, Chief Justice EYRE expressly disclaimed the relation of master and servant, in its ordinary acceptation, subsisting between any of those parties; and that he most emphatically repudiated the notion, that the defendant was to be brought in under the "large and loose proposition," that a man was to be answerable for every injury arising in carrying into execution that which he has employed another to do. The observation naturally suggests itself here, that it is quite surprising, the court, in all those cases, should have been put to such difficulty to find the ground, on which the land owner was to be held liable for injuries sustained during the progress of the work on his premises from the acts of the contractor and job men,

if they, the contractor and job men, were servants by force merely of their being job men and contractor, as is urged against the present defendant. Would those learned judges have been apt to look over so good a ground, and so plain before them? But they did more. They did not merely overlook it; but they went further, and condemned and rejected it. But there is another case still stronger. In 1842, the case of *Repson* v. *Cebitt*, 9 M. & W., 710, was before the court of exchequer, in which the facts were, that a builder was employed to make alterations in a house, including gas-fixings, and he made a contract with a gas fitter to do that part of the work; and in the course of its execution the gas exploded through the gas-fitter's negligence and hurt the plaintiff, who sued the head contractor. But it was held the action would not lie. Now there is no doubt, that the gas-fitter and the owner of the premises were, each, liable; the former, for his own default; and the latter, as owner of the premises where the injury was sustained, but not as master of the gas-fitter; for he was servant to no one, not even the builder who employed him. Why was he not servant to the builder, and the latter, accordingly, liable for his negligence? The judges state the reason distinctly, and truly, as far as I am capable of understanding it. Lord ABINGER says Cebitt was not liable, because Bland, the gas-fitter, "did *not* stand in the relation of *servant* to him, but was merely a *subcontractor;*" which plainly means, that the one was not servant to the other, *because* he was a *subcontractor*. Baron PARKE says Bland was a subcontractor to do certain of the works, and *therefore* the relation of master and servant did not subsist between him and the defendant. Those positions are so explicit, and so tersely expressed as not to be susceptible of misapprehension; and one would suppose, that no one, with them in his mind, could be at a loss to determine the relation between the parties here; in whose acts and dealings

there is nothing equivocal, that can confound. It is a distinct job, undertaken by the contractor for his own profit, and upon the strength of his own skill and ability, and at his own risk, without obliging or allowing to the defendant to interfere in the least with the operation. It is, therefore, absolutely certain, that the defendant had no more authority, morally or legally, over the house-mover, than the latter had over him. They stood exactly upon a par to every intent, as contracting parties, and were not master and servant, unless in the sense that one is the servant of everybody, for whom he does any work. There are, indeed, in the books some cases, which turn upon very nice points, as to the facts from which it was inferred, that the employer had or had not the control of a person actually working for him, so as to render the employed the other's servant. *Laugher* v. *Pointer* was one of them. A gentleman hired of a stable-keeper a pair of horses to draw his carriage for a day, and with the horses the other sent his own driver, through whose negligence in driving the plaintiff was injured, and an action was brought against the owner of the carriage. Upon the question, whether he was liable, the court of king's bench was equally divided—as, indeed, were nearly all the judges of England at one time. I confess, I should be at much loss at this day to say, on which side the better argument was. A gentleman cannot judge of strange horses, and the stable-man might not be willing to trust his horses in any hands but those of his own driver, whom he knew, and who knew the horses; and therefore it would seem to be a case of separate undertaking by the stable-man, and, consequently, not subject to the control of the owner of the carriage. On the other hand, it is difficult to suppose, that a gentleman can intend thus to put himself upon the will and pleasure of a postillion, and there is a presumption, that he really exercises an authority as to the places and manner of driving. But,

however doubtful may be the application of the rule to such a case, in order to know, whether those parties stood in the relation of master and servant, the rule itself stands out boldly and truly in all that the judges say. Hence, Mr. Justice LITTLEDALE says, that the job man was not a servant, because he was carrying on a distinct employment of his own, in which he let his man and horses both to the defendant: that the owner of the carriage, therefore, did not employ the driver and had no power to dismiss him or take the management of the horses from him. It is plain, that by the terms, "distinct employment," the judge did not rely upon the stable keeper's having a known calling, as a separate possession, as making a difference, except so far as it afforded evidence of the nature of his engagement with the defendant, namely, that he was dealing by way of independent contract, and not as putting himself a servant to every one to whom he let horses. There can be nothing in the calling of the two contracting parties being the same or different; and if the owner of the carriage had been, himself, a livery-stable-man, and yet chose to hire horses from another, their relation would be like that which, under similar circumstances, would subsist between men of other avocations. If that, however, were material, this case, as it appears to me, would clearly fall within such a distinction; for, I protest, that I should be as little competent to move a house as to build one; and I believe that in large towns removing houses is one of the regular pursuits of life, requiring much skill and experience and strong and expensive apparatus to do it expeditiously, cheaply and safely. I do not deem that of any importance, however; since I consider the reasons of both the Chief Justice and Mr. Justice LITTLEDALE in *Laugher* v. *Pointer*, to proceed distinctly upon the principle, that the defendant had bargained with a job man for the service by an independent agreement, and therefore the job man's servant was not the defendant's servant—it being enough for

one man to be the servant of one master. But the exemption of the defendant did not depend on that quaintness, that the driver was the livery-stable-keeper's servant and therefore could not be the defendant's. On the contrary, the driver was not the gentleman's servant, because his master was not such servant; for, if the stable-keeper, himself, had been driving, the defendant would have been as little liable as *his* master, as is clearly laid down in the subsequent case of *Quarman* v. *Burnett*, as the unanimous opinion of the court of exchequer after a vacation for the full consideration, which Lord DENMAN said it received. There it is admitted, that the hirer of job horses and a driver may make himself responsible for the driver, by taking the management and order the driver to go in a particular manner. Yet it was distinctly stated, that he would not thus become liable, by virtue of the relation of master and servant. The court say, first, that the coachman, who did the injury, is liable; and, so far from holding, that the stable-keeper would not be liable, if he had driven himself, or that the defendant in that case would have been, they say, secondly, that the stable-keeper was liable, as he undoubtedly stood in the relation of master to the wrong-doer, having selected him, and having power to control and remove him: And they say, thirdly, that the owner of the carriage was not liable, because he was *not* the master of the wrong-doer, nor of the wrong-doer's master. Why was he not? Because, say the court further, he was "a third person entering into a contract with the master." (the job man,) "which did not raise the relation of master and servant at all. To make such a person liable, recourse must be had to a different and more extended principle, namely, that a person is not only liable for the acts of his own servants but for an injury by the act of another person in carrying into execution that, which that other person has contracted to do for

his benefit—which is too large a position." We may here take notice that the court lays stress upon the circumstance that the defendant was a hirer by the job, not merely to show that the driver did not become his servant, but also that, for the same reason, the driver's master did not become the defendant's servant; for the words are, that *the contract* did *not* raise the relation of the master and servant *at all*. Of course, if the job man was liable for the neglect of his servant, he would have been for his own, had he gone, just as the coachman, whom he sent, was said to be, that is, as the wrong-doer. That case carried with it the whole court of king's bench in the same year, in *Milligan* v. *Wedge*, 12 Adol. & El., 737. The case was, that there was a by-law in London, that no one but a licensed driver should drive cattle from Smithfield through the city, and that a butcher bought a bullock and hired a drover to drive it to his slaughter pen without the city, and the drover put it in charge of his boy, and by negligent driving, after he had passed through the city, damage was done, and the butcher was sued, and judgment given for him. That is another plain adjudication upon the same principle, namely, that when a man hires another upon an independent contract to do work upon his own responsibility, and not under the orders of the employer, they do not become master and servant. It is in that sense, Lord DENMAN speaks of the drover, as exercising a distinct calling—as tending to show, that he was not to do the work under the butcher. For, he says, the mischief was done in the course, not of the butcher's business, but the drover's; meaning, their business by the contract according to its true construction, in reference to the skill of the several parties and the responsibility each was to have in performing the job. It could mean no more; for he could not have reference to the authority conferred on the drover by his license, as that did not extend beyond London, and they had got out

of the city before the damage was done, and were then but common job men. Indeed, Mr. Justice COLERIDGE goes on the express ground, that, whether the drover or his boy was driving, the butcher could not be held liable, because he made *a contract* with the drover, that he should drive the bullock, and *left it under his charge;* and the relation, *therefore*, of master and servant did not exist between them. One could hardly expect to find language more apposite to any case than that is to the present, in support of the positions I have thought it my duty to state.

There is still another case to be noticed, that of *Martin* v. *Temperly*, 4 Adolp. & El. N. S., 298. The defendant owned two barges which he worked on the Thames. By a statute, and a by-law of London, no one but freemen of the Watermen's Company, or their apprentices, were allowed to navigate craft on the river, and there were about six thousand of them. A freeman of the company was foreman to the defendant and let himself and an apprentice by the week to the defendant, who paid the wages weekly. The case also states, that the foreman was paid by the defendant by the job for what the apprentice did. The foreman then hired a freeman of the company by the job and put his own apprentice aboard with him to navigate the barges on a particular day, and they did it so negligently as to injure a vessel belonging to the plaintiff, who sued the owner of the barges and recovered; and, as it seems to me, very properly. To say nothing of one of the hands on board being the apprentice of the defendant's undoubted servant and being put on board upon a standing contract with the defendant, the liability of the defendant arose from the fact, that the boats were then in his service, actually employed in earning money for him. It was the regular course of employment of them and mode of engaging hands for them; and it was nothing, whether the defendant paid the hands so much a week or so much each job of such or such a kind. For, there is no magic

in the term job, which will prevent a person from being liable for another whom he employs under him, and earning profits for him, being under his orders and rule. That is the very principle, for which I contend; though I say, that if a man is hired, not to earn profit for another or to work under his government, but to do a particular piece of work for him according to his own skill, such a man is not the servant of the other. Now, *Martin* v. *Temperly*, so far from militating against those positions, goes explicitly to sustain them. Two objections were taken on the part of the defendant. One was, that he was obliged by act of parliament to employ the freemen, and, being imposed on him, he ought not to be responsible for them. The other was, that they were employed for the job, and therefore were not servants. Both were readily answered. The reply to the first was, that the act of parliament, even, called the Watermen the servants of their employers; and that, if they were not, there would really be nobody responsible for barges on the river, as there could be no other hands on board but freemen—which could not have been intended. Besides the number was sufficiently great to allow a proper selection. With that, however, we have no concern now. Our business is with the other point. And upon that Lord DENMAN remarks, that the distinction between *Milligan* v. *Wedge* (in which he presided) and that case was, that in the former, the owner of the bullock had *no longer any control over it*, but that in the lattter *it was otherwise.* And Mr. Justice COLERIDGE stated the men were the defendant's servants, "because *they were under his control;* that is, in doing the work in the ordinary way." As to the difference said to arise, where a workman is paid so much for doing the whole job, he denied its application there, because "the defendant might either pay for a given time or given work, *and the men here were as much under the defendant's control, as a gentleman's coachman is under that of his master.*" To that I can add

nothing to make the case more applicable to the one in hand. It goes, with all the other cases, to establish, that, when a hireling is under the ordering of another, he is his servant; but when one person employs another at a fixed price to do a particular piece of work for him, not on his land, and over which the employer is to exercise no control, they stand in the relation of joint contractors, and not of master and servant. That appears in every case to be the test—whether the agreement is such, that the one is to have the control over the other—the ordering and rule over him, or the contrary; and it is an infallible test. If I employ a man to carry me or my goods I am not bound for his acts. If the article I engage him to carry be my carriage and he puts it on railroad cars or into his wagon, in order to transport it, he is my bailee and not my servant, and I am not liable for him. So, if, instead of doing that, he puts his horses to it and carries it on its own wheels, it can make no difference; and he is still but my bailee. And so it was, when the defendant engaged the man to move his house, and he did it. How is it possible, that man can be called the defendant's servant? He could not interfere in the work without breaking his contract. Indeed, he had no more authority in law over the house-mover than the plaintiff himself had. Suppose that a person had employed hands to help him and had contracted debts for machinery with which to perform the operation, would the defendant have been liable for them, as debts contracted by his servant in the course of his employment? If a person employ another to build him a house out and out, is the employer liable to pay for all the materials the other may buy for the work, because got by his servant for his use ultimately? Surely not, unless we are to resolve all engagements between man and man into such as create the relation of master and servant. It seems to me, in fine,

that the defendant is clearly not liable. And I am not able to add anything which can make it plainer.

PER CURIAM. Judgment affirmed.

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JACKSON v. HAMPTON.

When a judgment is obtained against two or more, and no bail bond has been taken from either of the defendants, in the suit, and the sheriff, who has thus become bail for all, after the rendition of the judgment and the issuing of the *ca. sa.*, is directed by the plaintiff not to serve the *ca. sa.* on one of the defendants, he is still liable, as bail, for not surrendering the other defendant.

NASH, J., *dissentiente.*

The cases of *Trice* v. *Turrentine*, 5 Ire., 236, and *Waugh* v. *Hampton*, 5 Ire., 241, overruled.

Appeal from the Superior Court of Law of SURRY County, at the Spring Term, 1848, his Honor, Judge *Pearson*, presiding.

This is an action against the sheriff, as bail for one Forkner, in a suit against him and one Walker—Plea, no *ca. sa.* against the principal. There was a verdict by consent for the plaintiff, subject to be set aside and the *scire facias* quashed, if the court should be of opinion against the plaintiff on the following facts:

The plaintiff sued out a *ca. sa.* against both defendants and delivered it to a deputy of the defendant, and told him, that his object was to go against the bail of Forkner, and therefore that he did not wish the writ executed on

Walker. The deputy, however, arrested Walker, and then let him go at large, upon his promise to have a bond executed for his appearance at court to take the benefit of the act in favor of insolvent debtors, or to appear then in person. Accordingly Walker made his appearance at court, and the deputy sheriff again took him into custody, and was about to return *cepi corpus* as to him, when the plaintiff's attorney told him again, that he did not want Walker, but wished to go against the bail of Forkner, and the sheriff then discharged Walker, and returned the writ, not executed as to Walker, and *non est inventus* as to Forkner.

The presiding judge was of opinion, that the plaintiff had not complied with the rule, which required the creditor to seek payment from all the debtors in the judgment before he could resort to the bail of either; and that the arrest of Walker did not aid him, as it was made contrary to his directions, and was not recognized by him, and for that reason the sheriff had discharged Walker. The verdict was therefore set aside, according to the agreement, and the plaintiff appealed.

*Iredell*, for the plaintiff.

*Boyden*, for the defendant.

RUFFIN, C. J. The decision of this Court in the case of *Trice* v. *Turrentine*, 5 Ire., 236, and in that of *Waugh* v. *Hampton*, at the same term, was the authority which governed the presiding judge in this case, and the present appeal was designed to bring that decision under review. It was given with hesitation by a divided Court. After taking time for deliberation and maturely reflecting on on the reasons given in those cases, the Court, believing the opinion to be erroneous, is constrained, though reluctantly, to hold it so.

The opinion delivered laid down a position entirely new to the profession, and in opposition to a course which had been always practised in this state. There had been many judgments against bail of one defendant on *non est inventus* returned as to him, because he could not be found, and returned, as of course, in respect to the others, by the direction of the plaintiff not to take or to look for them; and there can be no little doubt but that the same would have been done in those cases and in the present, if the sheriffs had not happened to be the bail. It is manifest upon the face of the opinion, as delivered by our late learned Brother DANIEL, that the judgment rests upon this position: That when a judgment is taken against two or more, as between all of them and the bail of one, they are all principal debtors, and the bail stands as surety for all the defendants. He does not, indeed, lay down the proposition quite so explicitly as that—as he would, doubtless, have done, if he had seen his way as clearly as he usually did. But that is the necessary effect of what he does say. His words are: "that the legislature considered all the defendants as principal debtors, and the bail of all or any of the defendants as *quasi* sureties only; and before these sureties [bail] should be looked to by the plaintiff for the debt, he should show by a *ca. sa.* returned *non est inventus* as to all the principals, that he had been unable to get his debt"—that is, from either of them. That position is, we think, essentially wrong; and, as it lies at the foundation of the opinion, the whole must fall together. The error consists in regarding the bail of one defendant as the surety of another, or that any person is the principal of the bail except him, for whom he became bound by the bail bond. The sheriff, indeed, does not give a bond, but becomes bound by law as a special bail, if he fail to return a sufficient bond given by other bail. But it is admitted in the opinion, that can make no difference, and that he is to be

regarded as if he had given a separate bond as the bail of Forkner; for, bail is always taken for each defendant separately, and the sheriff cannot prejudice the plaintiff by becoming bail under the statute instead of taking a bond from other sureties. Now, if several bonds be given by different bail for the different defendants respectively, we must deny positively, that the bail in one of those bonds can be deemed the bail of another defendant, or his surety, or *quasi* surety, to any purpose whatever. The term "*quasi*," as here used, has no meaning or legal effect, but is calculated only to mislead. One must be surety for another or not; for there is no middle state or relation. Then, it seems clear, that the bail and surety for one is not the surety for the other, more than he is his bail. He becomes bound solely by becoming bail, and he is bound as surety as far as he is bound as bail and no further. It follows, that his right of indemnity goes to the same extent, and no further. Judge DANIEL must have felt that to be so; and that induced him to use the qualifying phrase, "*quasi sureties*," which, however, served not to help on his argument, but only to perplex the question the more. When one man is surety for another, he has a right to be made whole by the principal for any loss sustained thereby, and to contribution from any other bound as surety for the same debt. That is inherent in the relations of principal, surety, and co-surety, and every court recognizes it, which takes cognizance of questions between persons in those relations. Yet it is distinctly admitted in the opinion, that there is no such right to indemnity or contribution from one defendant or his bail to the bail of another. Indeed, it was expressly held so, in *Osborne* v. *Cunningham*, 4 Dev. & Bat., 423; and in *Ferrall* v. *Brickell*, 5 Ire., 67. Judge NASH, in delivering the opinion of the Court, said that "the sheriff, as bail,"—that is, for Lowe, who was not taken—"was *not in any manner concerned* in the effort to be made by

Hawkins"—who was the other debtor—"to procure his discharge under the insolvent law." That must be seen to be so, when one reflects, that there is no mode by which a person can become surety for another but by contract; and that the contract of bail is in a prescribed form, which in terms is restricted to his one principal. That consideration by itself ought, it would seem, to be conclusive on the point. But its force was avoided by the observation, that, although the bail of one defendant is not entitled to indemnity or contribution from another, yet he has an interest, that all the defendants shall be brought in, because, peradventure, one of them, for whom the bail is not bound, might show that the debt has been paid, or might then be induced to pay it, and so the bail might get off without either paying any money or rendering his principal. True, he might. But the question recurs, ought he to get rid of his engagement in that way? Has he a right so to do? Now, it is obvious, that one of the original defendants has precisely the same interest, that the creditor should bring in his co-defendants, which, when existing in the bail of one, is supposed to create the obligation on the creditor to take all the debtors, if he can. For, one defendant may, with as much truth, say to the creditor, your judgment is against two, and therefore each ought to pay his half, and you ought not to imprison me for the whole debt, because, if you would take the other man also, he might show that he has paid his half, or might be induced by the imprisonment to pay it now. As far as the interest of one defendant and the bail of that defendant goes or can operate upon the question, it is the same in each. But has either of them the right to demand of the creditor thus to imprison all the debtors? Plainly not, in the one case more than in the other; for the right depends upon the interest of the several parties, and that has been shown to be the same in each. But, without pressing that point further, there are other observations to be made upon the

proposition. The first is, that it is a total departure from the principle, on which the opinion sets out, as the foundation of this right in the bail, namely, that of suretyship. This view leaves that notion out of sight, and, consequently, the idea of indemnity is abandoned. A proposition, distinct from the other and entirely new, is brought forward: that, by virtue of the requirement in the statute of a *ca. sa.* returned *non est inventus* before the *sci. fa.* against bail, there is an obligation on the creditor to take all the original defendants, if he can, before he can have recourse to the bail of one, who had fled the country. Now, that seems to be a complete begging of the question. Whence arises that obligation—how is it to be inferred? The statute, indeed, requires the *ca. sa.*, and it must be as broad as the judgment, and therefore run against all the defendants. Still, as the bail is bound but for one, where is his right to require the creditor to take anybody but the one, for whom he is bound? If his principal be taken, the bail is instantly discharged. By what? Not by his principal's paying the debt, but by the taking merely. For that was the contract of the bail—that he would render his principal, if he did not render himself. But the rendering or taking of another defendant leaves the obligation of the bail precisely as it was before. He is still bound to render his principal or pay the money; and the creditor, while having one defendant in jail, may levy the money from the bail of another. Suppose he should; how, then, do those parties stand to each other? Why the imprisoned defendant is immediately discharged, because the debt is paid; and yet the bail, whose money paid this man's debt and turned him out of prison, and who is said to stand as *quasi surety* for him, cannot get one copper from him, who is thus discharged from debt and imprisonment. For, that was the adjudication in the two cases before cited; and in each it was clearly right, as we think,

inasmuch as the contract of the bail is for and with his own principal and him only. The case of *Osborne* v. *Cunningham* is particularly strong, because the defendant, as we collect from the statement, may have been not only a joint debtor in form, but in fact. But, if it were otherwise, and he was the surety of Patton, it is much the same; for, in that case, the original surety and the bail for the principal debtor would have stood in the relation of co-sureties; and to meet that view the defendant offered to show, that he had paid one-half of the debt before the suit, but the court would not hear the evidence, because there was no privity between them and therefore the bail could not recover under any circumstances. But there is another observation, which seems very material. If the bail of one has such an interest in the creditor's pursuing all the defendants as to amount to a right in the bail to require him to do so—because, as it is said, it may be, that he would not have bound himself for that one, if the others had not been parties—then, plainly, the creditor ought to be bound to prosecute all the original defendants to judgment. For, there is no substantial difference, as far as the bail's liability and interest is involved, between letting off the solvent defendant before judgment, and declining to imprison him afterwards. Yet it was held in *Bradhurst* v. *Pearson*, 10 Ire., 55, that the sheriff was the bail of each separately, and that the plaintiff's entering a *non pros.* as to one defendant did not discharge the bail of the other. Those cases show, that the law cannot look out of the contract of bail for his liability, or undertake in proceedings against bail to redress collateral inconveniences on the one side or the other. Some of these inconveniences to the bail are adduced in the opinion under consideration, as reasons for the extraordinary privilege there extended to him. It is said, for example, that a solvent defendant may be here, and yet the bail of the other made liable, although his principal may have become insolvent and fled—which

is adduced as a hardship. But, necessarily, it is none at all; nor generally would it be one. In the first place, it is to be replied to the bail, that he bound himself to render his principal, and the very case, which his obligation was intended to cover, has happened, namely, the flight of his principal beyond the process of the court. In the next place, he is not bound to pay the debt, if he will render his principal; and to that purpose his solvency or insolvency is not material; and, indeed, he cannot know that his principal would not be able to procure the means of payment, if surrendered. In the third place, he cannot know that his principal is not the primary debtor, and the very man who ought to stand not only before him but before the other defendants in the judgment—he being the principal debtor and the others his sureties. Suppose this last to be the case; then the creditor, so far from pressing payment out of the original surety by *ca. sa.*, it seems, is under an equitable obligation of benevolence to him to get payment from the bail of the principal rather than from the surety. For, in *Parsons* v. *Briddock*, 2 Vern., 608, it was decreed, where the principal was sued and gave bail, and afterwards an original surety paid the debt, that such surety was entitled to an assignment of the judgment the creditor had taken against the bail, and to use it to indemnify himself out of the bail. How far that might be sustained now, it is not necessary to say. It shows, at all events, that the surety and the bail are not co-sureties, as this Court held in *Osborne* v. *Cunningham*, and that the bail can have no recourse on an original surety, whether it be true *vice versa*, or not. Let another case, which is not uncommon, be stated: Principal debtor and surety are sued jointly, and the former, in order to get out of the sheriff's hands, deposits with him an indemnity. Yet it is said, that the bail, with the principal's money in his pocket to pay that very debt, may insist upon the

creditor's putting the surety in jail, in order to extort payment from him. That would be a hardship, indeed; but it would be on the other side. Again: Suppose, as appeared to be the fact in the case of *Trice* v. *Turrentine*, that some of the defendants were insolvent, while the defendant for whom the bail undertook might be able to pay the debt. Wherefore compel the creditor to put an honest insolvent in prison, be at the expense of maintaining him there, and, on his swearing out, pay the sheriff poundage on the debt, which he could never get back? The law, we are very sure, could have no such intention. The object was to require the creditor to seek the debtor, whose bail he purposed to charge. It is like the common case of an execution against two, upon which, though the law requires the personalty to be all sold before land, the constant course has been, as well with levies of a justice's execution as with sales by sheriffs, to proceed against the land of one defendant, when his chattels were exhausted, although the other defendant might have a sufficiency of chattels to satisfy the debt. Indeed, we have a statute, which requires that, when it appears upon the process, that one defendant is principal and the other surety. So, if there be a joint judgment against two, and one of them be honestly insolvent, so that the creditor cannot make the requisite affidavit to entitle him to a *ca. sa.* against him under the act of 1844, yet the other is fully able to pay the debt, but his property is not tangible, or he is about to leave the state. Could any court, upon affidavit of those facts and an undertaking by the creditor not to serve it on the insolvent, hesitate to issue a *ca. sa.* in conformity to the judgment against both? To refuse it would be to defeat justice and stifle the great purposes of the law under its forms. It is a very common thing for an execution to issue for one sum, with an indorsement to raise a less. The execution issues in one form for conformity to the

judgment, but either a direction of the clerk or the order of the plaintiff written on the process is an authority, how far short of its face the officer may go in executing it; and this may as well apply to persons as to things mentioned in it. Thus a *capias ad respondendum* issues against a man and woman, whereby the sheriff is commanded in terms to take their bodies, yet he in fact arrests but the man, and as to the woman the writ operates but as a summons. Would the sheriff be bound to arrest the woman, because the writ was in that form? Or, if not, would he be at liberty not to arrest the man because he could not arrest the woman also? Certainly the answer is in the negative in each case. The plaintiff could require the sheriff to arrest his male debtor, and direct him authoritatively not to arrest or imprison the woman; for the law, in exempting a female from imprisonment, did not alter the form of the process against her, but only changed its use as to a female. Indeed, if there be a *capias ad respondendum* against two men, can anybody doubt, that the plaintiff may, notwithstanding its terms, order the sheriff not to hold one of them to bail? It has been done thousands of times, and is every day's practice. That is nothing more nor less than an order not to arrest or take the body, but to summon; and to that extent it is, not changing the form, but the effect of the writ. So, in order to charge bail, the course was to issue a *ca. sa.* according to the judgment, and, at the direction of the plaintiff, not to serve it on particular defendants, but to return it *non est inventus* as to those, whose bail it was the object to fix. If that were not so, creditors would always bring separate actions; and if the law requires the creditor to imprison insolvent defendants or sureties, before proceeding against the bail of a solvent defendant or of the principal debtor, no court ought to order him to consolidate. Besides, it would be so easy in other ways to evade the consequences of the rule, as to make it of

little value to the bail. For, the creditor would have nothing to do but to issue his *ca. sa.* a few days before the return, and give notice of it to a defendant, whom he did not wish to arrest, so as to enable him to be out of the sheriff's county for a short time, until *non est inventus* should be returned. That done, the sheriff would be fixed, and could never afterwards either take that defendant upon his own authority, or require the creditor to take out another *ca. sa.*; and thus this supposed privilege of the bail of one, to have process against all the defendants, would be rendered of no value. True it is, if one defendant be arrested and discharged by the creditor, that discharges the bail of another defendant. But why? Not because there is any connection between them, but because the other defendant, the bail's principal, is discharged. Taking the body is satisfaction of the debt *prima facie*; and it is absolutely, if the creditor release the debtor from arrest. *Bryan* v. *Simonton*, 1 Hawks., 51. It is the same as payment; and, of course, the bail of all the defendants and all the defendants themselves, are discharged, there being no longer a debt, for which they can be liable. But, while the debt remains, the bail of one defendant has no right to require that another defendant, as such, shall stand before him, any more than he can have a recovery against him for any sum he may pay as the bail of the former. For, the contract of bail is restricted to *his* principal. If the creditor arrest him, that exonerates the bail at once; and nothing else can, except the payment of the debt, or its satisfaction, as just mentioned. The law cannot undertake to settle, upon arbitrary rules, collateral equities that may exist between the parties, nor to judge of hardships that may arise to the one side or the other; but must satisfy itself with administering justice to each party according to the undertakings in their contracts. For these reasons the Court holds, that there was a sufficient *ca. sa.* and

return to charge the defendant as bail of Forkner; and therefore that the plaintiff was entitled to judgment on the verdict, and that it must be now rendered.

It has never occured to me that there can be several executions on a joint judgment, or one execution on two judgments, except as specially provided for in the case of principal and bail by the act of 1777, c. 115, s. 19. I do not look back to the cases upon the subject, because I know it to be too thoroughly settled to be shaken, that the execution must conform to the judgment; and therefore I concur in thinking on that point with my brother NASH, that the precedents from time immemorial cannot be safely departed from. I own, indeed, that I think the precedents right in themselves, and that it would lead to great mischiefs to disregard them. The record ought to be kept consistent upon its face, which can be done only by requiring in the execution a conformity to the judgment; and I have never heard a suggestion from any quarter that they need not coincide. Of course, my rule, as the safe one is, *stare super antiquas vias;* for I then know where I am. But if I get into new tracks, I cannot tell where they will lead me; and hence I deem it a duty to avoid them.

PEARSON, J. I fully concur in the decision overruling the cases of *Trice* v. *Turrentine*, and *Waugh* v. *Hampton*, But I trace the source of the error higher up than the Chief Justice does in the opinion delivered by him.

It may be proper to state, that when this case was before me on the circuit, feeling bound by the authority of those two cases, I decided in favor of the defendant, but advised an appeal, for the purpose of having them reviewed, because of a clear conviction that they were wrong, and at points with *Osborne* v. *Cunningham*. For, if as decided in that case, the bail, who has paid the debt has no action against a co-defendant of his principal, how

can it be, that he may resist a recovery, unless the creditor has run a *ca. sa.* against such a co-defendant, to the proper county, so as to force him to pay the defendant, or fly out of his county to avoid the process of law?

The source of the error in those two cases, as I conceive, is not in the idea, that bail is but a "*quasi security*," or that bail has the right to have all of the defendants before the court, as, peradventure, one of them may have paid the debt. These are but braces, props, outposts, of the main position; which is, that the judgment is a *joint one.* Yield this, and it follows, that the *ca. sa.* must be joint and must run against all the defendants; and then the conclusion is logical, that as our statute requires the *ca. sa.* to be returned "*non est inventus*," before the bail can be proceeded against, the plaintiff has no right to deprive them of this advantage by instructing the sheriff not to obey the writ, so far as one or more of the defendants are concerned, and as to them to make an untrue return. This, it seems to me, is trifling with the forms of legal proceedings, and the officer, being commanded by the writ to take the bodies of two, ought not at the instance of the plaintff falsely to return, that one is not to be found, when, in truth, he is in the county, for the purpose of throwing upon the bail a responsibility, which would not otherwise attach. It is this supposed privilege of having a *ca. sa.* truly returned, that induced Judge DANIEL to say—bail are "*quasi securities* only" and have a right to require that all the defendants should be brought into court, to see if the debt has not been paid. These are legitimate corollaries and support his main position, which is based upon the foundation, that the judgment is joint. Assuming this to be true, he is warranted in the inference, that the execution must be against all of the joint defendants, by the cases cited, 1 Ray., 244; 1 Salk.; 319, 2 Ray., 808; and it follows, that the return should be as broad as the execution, before the

bail is fixed; for, according to our statute, "it is intended that the *ca. sa.* should be effectual." *Finley* v. *Smith*, 2 Dev., 248. I cannot find fault with the reasoning of that learned judge, although all the inconsistences, pointed out by the Chief Justice, follow from his conclusions. I object to the position he takes for his starting point. To that I ascribe the error.

By the English law, a judgment against two or more is joint. If one dies, the burthen is upon the others. If all die but one, he alone is liable, and, if he be insolvent, the creditor loses his debt; and so is the law as to joint obligations. Our acts of 1789 and 1797 were intended to correct this inconvenience and injustice. They provide, that all obligations shall be joint and *several*, and that, if an obligor dies, the creditor may have his action against the personal representative and surviviing obligor. In *Smith* v. *Fagan*, 2 Dev., 298, it is held, that these statutes apply to judgments as well as to obligations, strictly so-called, and that judgments, as far as defendants are concerned, are joint and several. The nature of judgments being thus changed and made different from judgments in England, the authorities cited by Judge DANIEL are not in point. They decide, that an execution upon a joint judgment must issue as a joint writ against all of the defendants. But, here, the judgment is joint and *several*, and there can be no reason, why an execution may not issue against one of the defendants, treating it as a *several judgment* with a recital, that it issued upon a judgment against two, as on record may appear. This will preserve "the conformity" as well, and be more direct and consistent with truth, than the mode of issuing against both, with instructions not to serve it on one, which is the same, under a deceptive form, as if it only issued against one.

Although this decision would overrule several cases besides the two alluded to—among others, *Howzer* v.

*Dellinger*, 1 Ire., 475—yet it is, in fact, correcting but one error; the spring from which all the streams flow—that of considering judgments joint, as in England, and not as joint or several under the acts of 1789 and 1797; a distinction fully established by *Smith* v. *Fagan*. In that case the judgment was treated as several. The general doctrine was laid down and it was conclusively shown that the English cases are not applicable. Unfortunately the distinction was lost sight of. The English cases were again cited and followed, which led to the results above indicated, and make it now necessary to retrace our steps, at least as far as to overrule two cases, and, in my opinion, to overrule all, which flow from the same error.

Besides the case of *Smith* v. *Fagan*, the course of our legislature fully sustains the position that judgments are several as well as joint. The act of 1823 provides that no female shall be imprisoned for debt. It makes no provision for the case of two defendants, one of whom is a female, taking it for granted that a *ca. sa.* could issue against the male defendant alone, unless it was intended to screen him also. And the act of 1844 seems to be conclusive; for it provides that no *ca. sa.* shall issue, unless the plaintiff makes oath that the defendant conceals his property. No provision is made for the case of two defendants, thus taking it for granted that a *ca. sa.* can be issued against one. It cannot be supposed that it was the intention to let a fraudulent debtor go free, because he had an honest co-defendant, as to whom the oath could not be made. Nor in this case will the shift of issuing against all, but with instructions to make a false return as to one, "serve the turn"; for the oath is a condition precedent, and cannot be avoided by the plaintiff's undertaking to give instructions. If the position for which I am contending was not correct before, it must be so since this statute. The legislature must be taken to authorize

a *ca. sa.* to issue against one defendant, as to whom the oath can be made, although there be another, as to whom it cannot be made, and against whom, for that reason a *ca. sa.* cannot issue; and yet if the judgment be joint and the reasoning correct, that "all the defendants are a 'unit' and make but one defendant," the *ca. sa.* must issue against all or none. The late statute, which provides that a want of conformity between the judgment and the execution shall not vitiate, is no slight indication of the legislative will.

It is said this will make it necessary to overrule the cases of *Hicks* v. *Gilliam*, 4 Dev., 217; *McIlwaine* v. *Jones*, 4 Dev. & Bat., 154, and all of that class, in which it is held that one defendant cannot appeal, unless his co-defendants join. True! they all flow from the same fountain. There is no better reason for overruling those of one class than of the other. All are based upon the same error, and, that being detected, it is wiser to take a "fresh start" than to embarrass the law by attempting to sustain some of the cases by making "distinctions" "too fine for use." The process of reasoning in those cases is short and conclusive (admitting the premises)—a judgment is joint—therefore all of the defendants are a unit and make but one—and all must appeal or none—the judgment cannot be treated as several, which would be the effect of allowing one to appeal without all, and to close the argument by authority, it is added it is well settled in England that all the defendants must join in a writ of error, otherwise the court will quash. 2 Term Rep., 736; 3 Bun., 1789; 1 Wilson, 88. If, after error brought by one of several defendants in the names of all, the others refuse to join in the assignment of error, they who refuse must be summoned and severed. Cro. Eliz. 891; Cro. James., 94; 1 Arch. P. R. B., 232.

Thus it will be seen that the conclusion that all of the defendants must join in an appeal is deduced from the

English cases as to writs of error, which are founded upon the idea that the judgment is joint.

In England, the defendants, who refuse to join in the assignment of error, may be summoned and severed. Here there is no provision of the kind as to appeals, and a defendant is left without remedy, if his co-defendant refuses to join; so that, notwithstanding the acts of 1789 and 1797, which were intended to do away with the hardships and absurdities growing out of the doctrine of joint obligations, joint judgments, and survivorships, defendants are really in a worse condition than they are in England, where there has been no such salutary and wise legislation.

NASH, J., *dissentiente*. I do not concur with my brethren in the decision of this case. If, in their opinions filed, there had been a concurrence of views and no antagonistic reasoning, I should be more diffident of the one I have formed.

When the cases of *Waugh* v. *Hampton*, and *Trice* v. *Turrentine*, which are now overruled, were decided, I concurred with Judge DANIEL in the opinions filed by him. I have just examined those opinions with all the care I could bestow upon them, and with no little solicitude. I have heard nothing to shake or alter the views there taken. Nearly, if not all, the reasoning urged in this case, and most of the authorities now cited, were then used and pressed into the argument. It was thought by a majority of the Court then that, although arguments *ab inconveniente* were entitled to much weight in the construction and application of statutes, they had not, and could not have, the effect of altering the law and contradicting the will of the legislature, when acting within their constitutional limits: that, if an act be plain and its meaning perspicuous, the courts have no authority to refuse to execute it, because it may produce inconvenience; nor have they a right to apply it

to cases clearly not within the view of the legislature, unless the language used justify such application. Of this character is the familiar case of the statute, which punished with death the drawing of blood, within the verge of the Court. It was adjudged not to apply to a surgeon for bleeding a man, who had fallen down in a fit of apoplexy. Clearly not, without at the same time supposing those who passed the statute were crazy. The case now before the Court is, *pari passu*, with that of *Waugh* v. *Hampton*, and, without overruling it, judgment cannot be given for the plaintiff; if, indeed, there be, in substance, a difference, it is in favor of the defendant here. In this case the defendant actually arrested Walker, who appears to have been the principal debtor, contrary, it is true, to the directions of the plaintiff, (which, in my opinion, he had a clear right to do,) and permitted him to go at large upon the promise to appear at court and give an appearance bond. Walker did appear, and was again arrested by the defendant, and discharged by the direction of the plaintiff's attorney. I do not, however, propose to further notice this point, though, in my opinion, it would have been a good defense to the action.

I consider this a question arising exclusively under the statute law of this state and to be decided by it. In order to arrive at a just construction of the statute, we must see what the law was at the time of its passage, and ascertain what was the evil to be remedied. By the common law, bail could not be subjected to a recovery, as such, until a *capias ad satisfaciendum* had issued against the principal. Originally it was a writ for service—to be issued to the county, where the *venue* was laid, and if the defendant could not be found there, a *testatum ca. sa.* might be issued to any other county—1 Sellon's Prac., 518. The bail by their contract undertake, that, if judgment be obtained in the action against the defendant, he

shall satisfy it, or render himself a prisoner, or that they will do it for him. This is only on the supposition, that the plaintiff shall not be able to *take* the defendant in execution, and thereby get satisfaction from him, either by his paying the debt or by having his body in custody. As the bail were only answerable on the failure of their principal, when the plaintiff intended to resort to the bail, he was bound to proceed by a *ca. sa.* against the principal, and the writ was to be returned by the sheriff with a "*non est inventus;*" 2 Sellon, 45. And, if the writ be against two or more, it must be executed on all. 5 Rep., 86; 11 Rep., *Godfrey's* case. In process of time, the *ca. sa.*, so far as the bail were concerned, ceased to be a writ for service—the principle having been established, that the bail was not bound to surrender the body of his principal, until it was demanded of him, it was considered unnecessary to arrest the principal, and *notice* to the bail, that he was looked to for satisfaction, was sufficient. To give this notice, the *capias* was required to lie four days in the sheriff's office, and to be entered in his public book, as it was termed, whereby the bail, knowing where to look, could ascertain whether he was required to surrender the principal or not. 2 Tidd's Prac., 1098–9. After lying in his office the four days next preceding the return day, the sheriff returned it "*non est inventus*," though the defendant may have been with him all the time, and without looking for him at all. The writ thus becomes a mere matter of form. The plaintiff did not intend or wish it to be executed. His object was to get satisfaction out of the bail, without making any effort to get it out of the principal; thereby losing sight of the essence of the contract of the latter—that if the plaintiff could not take the defendant in execution, the bail would be liable. 2 Sellon, 44. Such was the law in this state, when the act of 1777 was passed. What was the evil, under which bail labored at that time, as the practice

then was? And what alteration was intended to be made by this act? North Carolina, at its enactment, was a very large state, extending from the Atlantic ocean to the Mississippi river—the population thin and scattered—our counties large—and the districts, into which it was divided, and in which the superior courts were held, were very extensive; and the latter had jurisdiction over the whole state. To adopt or continue the English rule, as to notice to bail, would have been a mockery—it was a rule or practice unsuited to the situation of the country and not at all calculated to give notice to the bail. What was the remedy provided by the act of 1777? It is, that a plaintiff shall not take out execution against the bail, until an execution be first returned, that the defendant is not to be found in his proper county, and until a *scire facias* be first made known to the bail, which *scire facias* shall not issue, until such notice shall have been so returned. It is obvious, that the legislature intended that the *ca. sa.* should no longer in practice be a writ of form, but that it should be of substance, and that it was intended mainly, if not entirely, for the benefit of the bail. The plaintiff *shall* carry out in good faith the contract on his part with the bail. He shall first call upon his principal. In a vast majority of cases, a man's bail will be those of his own county and vicinage. A *ca. sa.*, if issued to that county, could scarcely fail to come to the knowledge of the bail, and would at once apprise him of the necessity of taking care of himself. The act requires the writ to issue to the proper county, and in *Findlay* v. *Smith*, 3 Dev., 247, the Court decide, "that, *prima facie*, the proper county is the county where the original writ was executed." After animadverting upon the use of the *ca. sa.*, as being a matter of form, the opinion proceeds, "We think our legislature meant something more in our statute, and that it is required, as well for the benefit of the bail, as for the plaintiff, that it ought to be issued

in the county, *where it may be executed* by the *actual arrest* of the defendant." This is a judicial exposition of the act of 1777, so far as to the use of the *ca. sa.*, to subject bail. Let us now see, what is its meaning where it says, that a *scire facias* shall not issue against the bail, until an execution be first returned, that the *defendant* is not to be found, &c. What is meant by the word defendant? At common law, all the defendants to a judgment, to use my brother PEARSON'S expression, is a unit, and the *ca. sa.* must run against all—it must be as broad as the judgment. *Hobart*, 59; *Foster* v. *Jackson*, 6 Dur. & East.,525; *Clark* v. *Clements and another*. The word defendant means, then, *all*, who are defendants on the record, and who are liable to discharge it. I agree with his Honor, Judge PEARSON, in his opinion on this part of the case, that, if, from the nature of the judgment, the *ca. sa.* is to be as broad as the judgment, then the conclusion of the Court in *Waugh* v. *Hampton*, and *Trice* v. *Turrentine*, was perfectly logical: that, as the act requires the *capias* to be returned *non est inventus*, before the bill can be proceeded against, the plaintiff has no right to deprive them of this advantage, by directing the sheriff not to obey the writ as far as one or more of the defendants is concerned. "This," says his Honor, "appears to me to be trifling with the forms of legal proceedings." Suppose the execution had been returned in this case and in those overruled, *non est inventus* as to a part of the defendants, without taking any notice of the rest, would that have been a sufficient return within the act? I think, very clearly not. Let it be borne in mind, that the controversy arises mainly, if not entirely, upon the true construction of the 19th section of the act of 1777. It is not denied, but that the execution must be as broad as the judgment—that is, must issue against all the defendants, where there are more than one and all are alive. To say, that the plaintiff has a right to intercept the law in its course by direct-

ing the sheriff not to execute it upon some, is, in my opinion, and I say it with all due respect, paltering with the law. Why adhere to the form, when the substance is gone? Why issue the execution at all? or, if issued, why not let it be issued against the one, who is known to have left the county, and is not worth a stiver, in order to get at his bail? The cases cited do not appear to me to conflict in any degree with the opinions in those overruled: nor with this. They are all on cases, where the returns of the sheriff were full—here and in those overruled it was not so. In *Waugh* v. *Hampton*, the return is, "*non est inventus* as to Forkner and Richardson," and is silent as to the other defendants. In *Trice* v. *Turrentine*, it is, "King not found—I am directed by the plaintiff to execute this process on King only." In the present case, it is, "not executed on D. Walker—Samuel Forkner not found." Can it with any propriety be said, that such a return is within the act?—is the *ca. sa.* returned, "*non est inventus?*" But it is said, that the sheriff, by not taking bail, has made himself special bail for all and stands as if he had given a separate bail bond for each. Be it so, he has a manifest interest in having each principal debtor before the court; for a payment by one is a payment by all, so far as the bail are concerned. If the sheriff is not bound to arrest all the defendants, it is easy to imagine cases, in which the law may be perverted to the injury of the bail, particularly when he is the sheriff. It is a well-established principle, that there is no contribution among bail, nor has the bail, who discharges the liability of his principal, any claim upon any person but his principal. Let us suppose a case, then: A. and B. are sued jointly upon their joint obligation, in which they are both principals. A is entirely insolvent, and B. solvent. The sheriff, knowing the entire ability of B. to discharge the debt and having confidence in his integrity, takes no bail, and thereby constitutes himself special bail for each—a

joint judgment is had against them—B. discharges it, and not willing to pay the money, prevails on the plaintiff to let him have the use of his name to get it out of the bail of A. All he has to do is to cause a *ca. sa.* to issue against himself and A., and a direction to the officer from the plaintiff not to execute it on B., but on A. alone. The latter has left the county and the writ is returned *non est inventus* as to him. The sheriff is unable to prove the payment by B., and is subjected to the payment of the judgment for the benefit of B., for whom he is actually bail. Whereas, if it be declared to be the duty of the officer to seek for, and execute the writ on, both the defendants, it never would, in the case supposed, issue at all. And in the same way may the bail of one defendant, who is insolvent, compel the bail of another principal, who is also insolvent, not to contribute but to pay the whole debt. Now I do not pretend, that any such case ever did exist, or ever will, but it certainly may; and, as, in my opinion, the act of 1777 was made for the benefit and protection of the bail, I prefer that exposition, which is in accordance with its directions and most surely answers its ends. Many other cases will readily suggest themselves. Some are pointed out in the opinions in the cases of *Waugh* v. *Hampton*, and *Trice* v. *Turrentine*. Nor can any case be imagined more strongly exhibiting the danger to bail by the construction, against which I am contending, than the one now before us. I strongly suspect, that Walker was the principal in the note or obligation, upon which the original action was brought. He is passed by and the bail of a man, who had left the county, is called on to pay the debt—there is nothing to show, that Walker could not pay it. It is no answer, that the defendant is the bail for both. The principle is the same under the act of 1777, as if Walker and Forkner had given separate and distinct bail.

But another objection has been taken to the correctness of the decision in the cases overruled, and to the opinion of the judge below in this. It is said, the error consisted in considering the judgments upon which the *ca. sa.* issued as joint; whereas, they are in law joint and several, and the plaintiffs had a right to give to the sheriff the instructions they did. I do not agree with this position. It is based upon the 4th section of the act of 1789, ch. 314, and the exposition of it made by the Court in the case of *Smith* v. *Fagan*, 2 Dev., 302. In my opinion, the position is sustained by neither. The legislature has left us in no doubt as to its meaning. The preamble to the section, which, according to law books, is the key to unlock the mind of the law-giver, recites, that, by the common law, upon the death of a joint obligor, the debt cannot survive against his representative; which frequently operates oppressively and injuriously to the surviving obligors. *To remedy which:* "Be it enacted, &c., in case of the death of one or more obligors, the joint debt or contract shall and may survive," &c. Having provided for the evil recited in the preamble, they go on to prescribe, "that, after the ratification of the act, in all cases of joint obligations, or assumptions of copartners, or others, suits may be brought and prosecuted on the same, as if such obligations or assumptions were joint and several." Nothing is said as to the nature of the judgment or of altering its effect. By the common law, if two or more are jointly and severally bound in a contract, and they are sued jointly, and judgment obtained against all, the execution must be against all; because, though they are several persons, yet they make but one debtor, when sued jointly. Hob., 59; 6 Term Rep., 525; *Clark* v. *Clements*, et al. This is not altered by the statute, so far as the execution is concerned. Numerous decisions of our courts affirm the principle, that, when the judgment is against several, the execution must go against all—in other words, be as

broad as the judgment. The opinions in this case affirm it. I do not consider the case of *Smith* v. *Fagan*, as sustaining the position. A judgment had been obtained against two defendants, one of whom had subsequently died, and the *scire facias* was to subject the estate of the deceased defendant to the payment of the judgment. The Court decided, that under the first enactment of the 4th section of the act of 1789, the debt survived against his representative or estate. It is there admitted, that the case was not within the act, except by intendment, as being within the mischief proposed to be corrected. It does not, in my estimation, touch the question raised here. It does not, as I understand it, decide, that all judgments, even upon contracts, obtained against several persons are joint and several. The Court confine their attention to a case, coming within the mischief intended to be provided for by the act—that is, where one of several defendants to a judgment dies. After giving several instances where the death of one of several joint obligors shall not throw the burthen entirely upon his co-obliger, but his representative may be brought in, it is observed, "we can see no possible reason, why, in the case of a joint judgment it should not be so likewise"—that is, where the judgment is joint against several and one dies, no reason exists why the debt or assumption should not survive against his estate. In this case and in those overruled, the judgments are joint—that is, are against all the defendants and they were all alive at the time the *ca. sa.* issued, and are so still, as far as we are informed. The Court could not have intended to declare, that all judgments were several as well as joint. If they had, it would have been an *obiter dictum*, not called for in the decision of the case, and no further binding than as sustained by reason and the high authority, from which it emanated. But, that they did not so intend is evident from the case of *The Bank of Newbern* v. *Stanly & Jones*, 2 Dev., 476,

decided by the same judges at the succeeding term of the Court. A *scire facias* had issued against all the heirs of one Harvey to subject the real estate to the payment of a judgment obtained against the administrator. One of the defendants was an infant. Judgment was obtained against all, and a joint *sci. fa.* issued against all; and the Court say it was properly so issued, but that it could not, under the act of 1789, ch. 311, be levied on the land of the infant, until twelve months after the rendition of the judgment.

If they had intended in *Fagan's* case to rule, that all judgments were joint and several, the question could not have been raised in the case referred to. But the contrary opinion has been declared by this Court in repeated instances, particularly in that series of cases, wherein the Court have declared, that one defendant in a joint judgment could not appeal. *Hicks* v. *Gilliam*, 4 Dev., 218, is the first and leading case on the subject. It was decided in 1833, a majority of the Court consisting of the same judges who made the decision in *Fagan's* case. This was followed by the case of *Dunn* v. *Jones*, 4 Dev. & Bat., 154, decided in 1838. In *Stiner* v. *Cauthorn*, 4 Dev. & Bat., 501, decided in 1839, the doctrine is recognized. So in *Stephens* v. *Batchelor*, 1 Ire. Rep., 60, and in *Wilkinson* v. *Gilchrist*, 4 Ire., 228, in 1844, it was ruled, that all the parties to a judgment, either plaintiffs or defendants, must join in an appeal or it will be dismissed. The case of *Donnel* v. *Shields*, 8 Ire., 272, decided in 1848, is an exceedingly strong one. It was an action of trover for the conversion of slaves—the defendants pleaded severally, and the jury found them "severally guilty," but it assessed the damage jointly against the whole. The Court say the judgment was a joint one, and that one defendant could not appeal. At the same term the case of *Smith* v. *Cunningham*, page 460, was decided upon the same

principle. Here, then, are seven cases following quick upon the heels of *Fagan's* case, and, at no long intervals, each other, and all directly upon the principle, that judgments are joint, where the damages are joint against all the defendants, and necessarily so, because the judgment must pursue the verdict where it is given upon it. *Heydon's* case, 11 Cooke, 5; *Sawfield* v. *Bancroft*, Str. Rep., 910. It is impossible to suppose the individuals making these decisions were ignorant of *Fagan's* case, or of the principle intended to be decided by it; particularly when we recollect, that the leading member of the Court, which made them, was a member of the Court when *Fagan's* case was decided, and delivered the opinion. To sustain the position that all judgments since the act of 1839, ch. ....., are joint and several, is, at a dash of the pen, to overturn all these cases. I cannot consent to do so. I believe they were correctly decided; and that, therefore, as far as repeated decisions of this Court can settle any legal question, it is settled law here, that, when damages are assessed by a jury jointly against several defendants, the judgment must be joint, and cannot be several; and that, the *capias ad satisfaciendum* must run against all the defendants; and that, under the act of 1777, it must be returned *non est inventus* against all, if alive, before the plaintiff can proceed against the bail; and that it is not in the power of the plaintiff to intercept the course of the law, by directing the sheriff not to execute it on some of them; and that, therefore, neither in the cases overruled, nor in this, was there such a return of the *ca. sa.* as is contemplated by the act of 1777.

Other questions arose on the argument in the case of *Trice* v. *Turrentine*, which I have not noticed, because I agreed with my brethren, that there must be a repleader;

and if the case should come before us again, an opportunity will then be afforded me to do so.

My opinion is, that the judgment below in this case ought to be affirmed.

PER CURIAM. Judgment reversed and a *venire de novo*.

# GENERAL ORDER

AT

# DECEMBER TERM, 1849.

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The Judges of the Supreme Court will hereafter require that applicants for license shall have gone through the following courses of reading:

FOR THE COUNTY COURTS:

Blackstone's Commentaries, 4 vols.—2d volume *particularly.*

Coke on Littleton, or Cruise's Digest.

Fearne on Remainder and Executory Devises.

Saunders on Uses and Trusts.

Roper on Legacies, or Toller on Executors.

Revised Statutes, chapter 37, Deeds and Conveyances; 38, Descents; 121, Widows; 122, Wills and Testaments.

FOR THE SUPERIOR COURTS:

Third book of Blackstone.

First volume of Chitty's Pleadings.

Stephens on Pleading.

Fonblanque's Equity.

Newland or Powell on Contracts.

Mitford or Cooper, Equity Pleading.

Fourth book of Blackstone.

First volume Phillips or Starkie on Evidence.

Revised Statutes, chapter 31, Courts, County and Superior; 34, Crimes and Punishments; 63, Lands of Deceased Debtors.

Selwyn's *Nisi Prius.*

[Test.] E. B. FREEMAN, *Clerk.*

# INDEX

ACTION ON THE CASE:

1. An action on the case will not lie at the instance of A. against B., for bringing a covinous action against a third person for a penalty, that belongs to any one who would sue for it, which he had incurred under a statute, in which B. intended by his recovery in the action for the penalty, to prevent any other recovery, and that his own recovery should enure to the benefit of such third person. *Burnett* v. *Davidson*, 94.
2. If A. had brought his action against the person incurring the penalty, and he had pleaded a former recovery; A. might have replied that it was by covin. *Ib.*
3. If there be any redress for such covinous recovery, it is a public one, to be proceeded against by indictment for a misdemeanor. *Ib.*
4. The position is not tenable, that whenever damage is done the law implies negligence. *Herring* v. *Wil. & Ral. R. R. Co.*, 402.
5. But where the plaintiff shews damages, resulting from the act of the defendant, which act, with the exertion of proper care, *does not ordinarily produce damages*, he makes out a *prima facie* case of negligence, which cannot be repelled, but by proof of care, or some extraordinary accident, which makes the care useless. *Ib.*
6. What amounts to negligence is a question of law. *Ib.*
7. In an action on the case against a railroad company for the negligence of their agent in running over and killing a slave, where it appeared that the slave was asleep on the track, that the cars were going with their usual speed and at the usual hour, and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels; *Held*, that was not a case of negligence to subject the company to damages. *Ib.*

8. *Held*, that an action on the case will lie by the husband against one who entices away his wife. *Barbee* v. *Armstead*, 530.

9. Where A. made a contract with B. that the latter should, for a stipulated sum, remove a house belonging to the former from one side of a street to the other side, and B. performed his work so negligently, as to cause an injury to C.; *Held*, by PEARSON and NASH, J., Chief Justice RUFFIN dissenting, that A. was liable to C. for the damage he had sustained. *Wiswall* v. *Brinson*, 554.

ACTION IN ASSUMPSIT:

When a surety signs a stay of a justice's execution, without any request from the principal, and afterwards pays it, this is a mere voluntary payment and gives him no cause of action against the principal. *Rickman* v. *Williams*, 126.

ADMINISTRATOR AND EXECUTOR:

1. When an administrator or executor, after the delay of nine months allowed by the act of assembly, Rev. St., c. 46, sec. 25, pleads to an action the want of assets, he has a right to give in evidence a judgment confessed, prior to the time when the plea is pleaded, without regard to the priority of the time in bringing the suits. *Bryan* v. *Miller*, 129.

2. One of several executors may release a debt on demand due to the testator; it is not necessary that all should join. *Hoke* v. *Fleming*, 263.

3. Where slaves were given to A. during her coverture with B. and put in their possession, and after the death of B., C., his administrator, believing A. had a right, returned the possession to A., who claimed them as her own and retained the adverse possession for two years, and then conveyed them to C., as in his own right; *Held*, that after the termination of the bailment to A. and her delivery of the slaves to C., he was remitted to his original right, and held the slaves as administrator of B., and on the death C., the administrator *de bonis non* of B., was entitled to recover the slaves. *Williams* v. *Wilson*, 482.

AGENT AND PRINCIPAL:

A man gave authority to an agent to purchase some personal property, but only so far as he had cash of the principal, with which he was to pay for it. The agent purchased on the credit of his principal, who received it and con-

verted it to his own use; *Held*, that the vendor had a right to recover from the principal the price of the goods. *Patton* v. *Brittain*, 8.

APPEAL, &c:

1. An appeal from an interlocutory order of the county court will be sustained, when the question presented to the court is such, that a judgment upon it one way would put an end to the cause. *Mastin* v. *Porter*, 1.
2. When two defendants are sued upon what purports to be a joint bond, a verdict is found against both and an appeal taken to the superior court, a verdict may be rendered in the latter court against one only, and judgment pronounced accordingly. *Brown* v. *Conner*, 75.
3. When there is a judgment in the county court against two and one appeals, they both join in one appeal bond and there is judgment in the superior court against one and in favor of the other, upon the verdict of the jury, yet the court may render judgment against the latter upon the appeal bond. *Ib.*
4. A plaintiff may appeal from a judgment in his own favor. *Lenoir* v. *South*, 237.
5. Where a party has not been deprived of his appeal from the judgment of a justice, by any fraud, accident, surprise or denial of his right by the justice, he is not entitled to a writ of *recordari*. *Satchwell* v. *Rispess*, 365.
6. An appeal will lie to the superior court, from an order of the county court, allowing an amendment; and in such a case the superior court has the same right of discretion, in regard to the amendment, which the county court had—the order of the county court, being annulled by the appeal. *Britt* v. *Patterson*, 390.

ARBITRATION AND AWARD:

1. A suit was pending on a note executed by A. and B. B. had died and A. administered on his estate, and the suit was against him personally and as administrator. The following order was made: "Referred to C. & D. to take an account of the estate of B and to award, and, if they cannot agree, to choose an umpire, and their award to be a rule of court." The referees returned the following award: "This cause having been referred to us to take an account of the administration of the said A. and to make an award in the matters in controversy, we find, in taking the said account, that the amount of vouchers in the hands of the said A. exceeds the amount of receipts, with

which he is chargeable, by the sum of $513.62, &c. Finding, therefore, that the administrator has no assets, we award that the plaintiff pay the costs of this suit." *Cowan* v. *McNeeley*, 5.

2. *Held*, that the only matter submitted to the referees was the amount of the assets of B. in the hands of A., and that their award as to any other or further matters was void. *Ib.*

3. An award must be signed by the arbitrator, and made known to the parties and delivered, before it can be admitted in evidence. *Morrison* v. *Russell*, 273.

ASSAULTS AND BATTERIES :

In a case of assault and battery, the party, who strikes another, must be guilty, unless he be justified in committing it, as an act of self-defense. The law does not justify any assault by way of retaliation or revenge for a blow previously received. *State* v. *Gibson*, 214.

ATTACHMENTS :

1. An attachment, issued by a justice out of court and not made returnable within thirty days, is void. *Houston* v. *Porter*, 174.

2. A garnishee has a right to object, that the attachment under which he is summoned is void, and that therefore no judgment should be rendered against him. *Ib.*

3. Where A. conveys property by a deed of trust for the payment of debts, and the debts are unsatisfied, the property is not subject to an attachment against A. *Anderson* v. *Doak*, 295.

BAIL :

1. When the alteration of a writ, after bail has been given, charges the nature of the action, the bail is discharged. *Bradhurst* v. *Pearson*, 55.

2. But where in an action against two joint and several contractors, a nonsuit is entered, and afterwards the nonsuit is set aside as to one, and not as to the other, the bail of the one, as to whom the nonsuit was set aside and a verdict and judgment subsequently rendered against him, is not discharged. *Ib.* *S. P. Hamlin* v. *McNeil*, 306.

3. A bail, against whom a *scire facias* has been issued, cannot avail himself of the defence, that his principal has been arrested on a *ca. sa.*, at the instanse of another person, and discharged under the insolvent debtor's law. *Norment* v. *Alexander*, 71.

4. Where a judgment is against several and the sheriff had not taken bail from one, it was not necessary, before the act of 1844, ch. 31, to issue a *ca. sa.* against all, to subject the defendant as bail for that one. *Trice* v. *Turrentine*, 143.

5. Under the act of 1844, ch. 31, it is not necessary to issue a *ca. sa.* at all, in order to subject the bail. That act applies to the remedy only, and not to the contract of the bail. *Ib.*

6. Where a judgment is obtained against two or more, and no bail bond has been taken from either of the defendants, in the suit, and the sheriff, who has thus become bail for all, after the rendition of the judgment and the issuing of the *ca. sa.*, is directed by the plaintiff not to serve the *ca. sa.* on one of the defendants, he is still liable, as bail, for not surrendering other old defendant. NASH, J., *dissentiente.* *Jackson* v. *Hampton*, 579.

BASTARDS:

1. On the trial of an issue in a case of bastardy, under the act of 1836, Rev. Stat. ch. 12, sec. 4, the examination of the woman becomes full proof of the fact of paternity, and the jury is bound so to find, unless the defendant will shew the *fact* not to be so, and this he can do, only by proof of impotence or non-access at such time, as by the law of nature he could be the father. Evidence to show the *improbability* of his being the father is inadmissible. *State* v. *Goode*, 49.

2. Upon the trial of an issue in a bastardy case, whether or not the defendant is the father of the child charged to him, it is not competent to introduce any testimony to shew, that the child was not a bastard. *State* v. *Wilson*, 131.

3. The adjudication of that question belongs to the justices, before the oath of the woman is made, and if they decide against him upon that question, he has a right to bring it up by *certiorari.* *Ib.*

4. Where a single woman becomes pregnant in the county of Brunswick, where she had always resided, and went to New Hanover county, where she was delivered of the child, and then returned with her child to Brunswick; *Held*, that the justice of Brunswick had the jurisdiction, under the Bastardy Act, to institute proceedings to subject the reputed father to the maintenance of the child. *State* v. *Roberts*, 350.

BILLS OF EXCHANGES, &c:

When a bill has been drawn by A. upon B., in favor of C., and

is protested for non-payment, the acceptance by C. of another bill from B., unless it is expressly understood that this is to be a satisfaction of the debt due by A., does not debar C. of his action against A. upon the original bill, provided the bill of B. is dishonored. But it is necessary, for C., in his suit upon the original bill, to shew that he used proper diligence on the second bill and could not obtain payment. *Gordon* v. *Price*, 385.

BOUNDARY:

1. Where, on the trial of an ejectment, it appeared that one of the corner trees could not now be found, running the course and distance called for, but it was proved that many years ago a former owner of the land declared that the stump in a certain pond was his corner; *Held*, that the court below did not err in instructing the jury, that if this tree had been marked as a corner, at the time of the original survey, then it would control the course and distance; but, if subsequently marked, because the owner could not find the corner originally marked, then the course and distance would not be controlled by it. *Icehour* v. *Rives*, 256.
2. Where a deed described a corner as being on the *east* side of a creek, it is admissible for the party, by competent testimony, to show that the corner was in fact on the *west* side of the creek. *Hauser* v. *Belton*, 358.

BUNCOMBE TURNPIKE COMPANY:

1. Under the charter of the Buncombe Turnpike Company tolls are only demandable at the gates erected on the road, Therefore, a person, who passes on the road from one point to another, between which there are no gates, is not liable for any toll. *Bun. Turn. Co.* v. *Mills*, 30.
2. The act of assembly, incorporating the town of Hendersonville and exempting the citizens of that town from working "on roads without the limits of that town," does exempt them from working on the Buncombe Turnpike Road, as provided by the Charter of the Buncombe Turnpike Company. The roads referred to in the act of incorporation are the *ordinary* public roads of the county. *Bun. Turn. Co.* v. *Baxter*, 222.

COMMON SCHOOLS:

Although the Chairman of the Board of Common Schools may not have been appointed on the day prescribed by the statute, and although the bond he gives may not have been directed by the county court, yet if he accepts, and

acts under the appointment, he and his sureties are bound by the bond, as upon a common law bond. *State* v. *Perkins*, 333.

CONSTABLES:

1. The term of a constable does not expire upon the day of the term of the court, corresponding with that, on which he had, the year before, qualified and given bond, but it expires at the instant, when his successor qualifies and gives bond. *State* v. *Wilroy*, 329.
2. The same construction must be given to the special provision for filling vacancies. *Ib.*
3. Where a constable, in whose hands a judgment had been placed for collection, received in payment sundry notes of hand, and afterwards paid over the amount in money to the plaintiff in the judgment; *Held*, that the constable could not afterwards recover, in the name of the plaintiff, the amount of the said judgment from the defendant in the judgment, although he could shew that the notes received from the defendant were on insolvent persons and fraudulently passed to him. *Rogers* v. *Nuttall*, 317.

CONSTITUTION:

The legislature has the constitutional power to consolidate offices, by uniting the duties of one or more offices in one person, where the duties are not incongruous, as, for instance, the offices of clerk and clerk and master in equity. It is just, however, that the operation of such a law should be postponed, until a vacancy occurs in the office, whose duties are proposed to be transferred. *Troy* v. *Wooten*, 377.

CONTRACTS:

1. Where a man contracted to work for another for six months, at eight dollars a month, and the hirer at the expiration of four months refused to pay the hire for those months, alleging that he was not bound to pay until the expiration of the six months, upon which the laborer refused to work any longer; *Held*, that the laborer was entitled to recover for his four months' work. *Dover* v. *Plemmons*, 23.
2. Where a person agrees to work on the land of another for a share of the crop, the cropper cannot convey a legal title to his share of the crop to a third person, before an actual division and appropriation. *McNeely* v. *Hart*, 63.
3. And the owner of the land, who made the contract, is not estopped to deny the right of such assignee to recover at law. *Ib.*

4. To make a consideration for a promise, is not necessary, that the person, making the promise, should receive or expect to receive any benefit. *Brown* v. *Ray*, 72.
5. It is sufficient, if the other party be subjected to any loss or inconvenience. *Ib.*
6. A trust or confidence reposed, by reason of an undertaking to do an act, though the undertaking be entirely voluntary and gratuitous, is a sufficient consideration to support an action on the promise. *Ib.*
7. Where A. had contracted to sell certain land to B. and afterwards conveyed it to a trustee to be sold for the payment of his debts, and on the day of sale, upon A.'s forbidding the sale, it was agreed by parol between A., B. and the creditors secured by the deed of trust, that the land should be sold and the money, arising from the sale, should be subject, in the hands of the trustee, to the claim of the rightful owner; *Held*, that the trustee, although he had received the money, was not liable to an action of assumpsit by A., A. having at most but an equitable right. *Gaither* v. *Hetrick*, 114.
8. A. purchased a mare from B. and gave his note for the price. At the bottom of the note the following was appended: "It is agreed and understood, that a sorrel mare, for which the above note is given, is to remain the property of B. until the above note is fully paid" A., without having paid the note, sold the mare to C.; *Held*, that A. had no right to sell and his vendee acquired no title. *Ballew* v. *Sudderth*, 176.
9. All contracts are several, although made by partners. *Neill* v. *Childs*, 195.
10. Where a party claims as purchaser under an execution, issuing from a court of equity, and alleges, that the other party claimed under a deed, in fraud of the execution creditor, he must shew the decree of the court, as well as the execution, and, to make the decree evidence, it is requisite to have the bill and answer, and so much of the pleadings and orders as would shew that the decree was pronounced in a cause, properly constituted between parties. *Williamson* v. *Bedford*, 198.
11. A. made a contract with B. that he would place in the hands of a constable a large amount of promissory notes endorsed by A. to B., take the constable's receipt therefor and deliver it to B., upon which B. was to deliver to A. cotton yarn to the amount of the note. A., without placing notes in the constable's hand, fraudulently procured

him to sign a receipt, as if notes had been given him for collection, and handed the receipt to B., whereupon B. delivered the cotton yarn according to the contract; *Held*, that B. might maintain an action against A., either in case in assumpsit or in tort, at his election. *Hoke* v. *Fleming*, 263.

12. In action for the breach of a contract for repairing a vessel, when the contract was to have the repairs effected by the 1st of Jane; the plaintiff did not apply for the vessel until the 5th of July and the repairs were not then finished; *Held*, that he was entitled to recover what the vessel would have earned in freight from the 1st of June until she was delivered, if that was a measure of damages. *Sikes* v. *Paine*, 280.
13. A bond was given to A. B. for the rent of a house and lot, and in the same instrument was the following stipulation, "and the said A. B. is to put the house in order and put up the fences," &c. The lessee entered upon and enjoyed the premises during the time; *Held*, that the covenant to repair was not a precedent condition, and that A. B. was entitled to recover the rent, without shewing that he had made any repairs. *Watters* v. *Smaw*, 292.
14. Where a contract is made in another state, it is to be governed by the laws of that state, and not by those of North Carolina. *Anderson* v. *Doak*, 295.
15. A. conveyed to B. a tract of land, "together with the horses, cattle, &c., and all crops on the ground," in trust to sell for the payment of debts. At the date of the deed there was a corn crop on the ground, but it was afterwards destroyed by a frost, and a new crop was planted by A., who had been permitted to remain in possession. C. afterwards seized this new crop and converted it to his own use; *Held*, that B. was entitled to recover the value of this crop from C., in action of trover. *Black* v. *Eason*, 408.
16. The construction of a contract is a matter of law. When committed to writing, the meaning of the terms, when they are explicit, is a question for the court; but if doubtful and uncertain, they may be submitted to a jury with proper instruction. If the contract is verbal and the parties dispute about the terms, that is a matter of fact for the jury; but if there be no dispute about the terms, and they be precise and explicit, it is for the court to declare their effect. *Festerman* v. *Parker*, 474.
17. If a contract to perform certain stipulated services, for a certain sum, is not rescinded by the mutual consent of the parties, then a promise to pay an additional sum for the

same services is without consideration and cannot be enforced. *Ib.*

18. Where a man has enticed away another's wife, and he and the husband entered into a written contract, by which it was stipulated that the former should retain the wife and support her; *Held*, that this contract was against public policy, and, at all events, that the husband could rescind it, by making a demand for the restoration of his wife, and if this was refused, had a right to his action for the subtsequent detention. *Barbee* v. *Armstead*, 530.

COUNTY JURISDICTIONS:

Notwithstanding the act of 1844, ch. 13, relating to jury trials in the counties of Henderson and several others named in the act, a person cannot maintain an action on the case for the overflowing of his land by the erection of a dam for a public grist-mill in the county of Henderson, without having first proceeded by petition either in the county or superior court of Henderson, according to the provisions of the general law passed in 1836. *King* v. *Shuford*, 100.

DETINUE:

1. Where A. having a claim for a negro slave, sued out a writ of replevin, under which the sheriff seized a negro in the possession of B., which writ for cause was quashed; *Held*, that A. could not sustain an action of detinue against B. until the slave had actually been restored to the possession of B. *Foscue* v. *Eubank*, 424.
2. In an action of detinue, the plaintiff must show an actual possession in the defendant of the thing demanded, at the time or shortly before the writ issues, or a controlling power over it. *Ib.*

DEVISES:

1. A. devised as follows: "I give to the lawful heirs of my son B. deceased, the plantation whereon I now live," "I give to my sons C. and D. and their children, the residue of my estate both real and personal," &c; *Held*, that although, the testator had bought a tract of land, adjoining that on which he had previously lived, yet as he cultivated the two as one farm for many years, they were both to be included in the devise to the heirs of B. as "the plantation on which he then lived. *Stowe* v. *Davis*, 441.
2. It is not competent in the construction of a will to prove by witnesses, that the testator meant a clause in his will to be different from what it was written, or afterwards declared, that the clause was different from the purport of it on its

face; though evidence of parcel or not parcel of the thing devised, or any other that serves to fit a thing to the description, is admissible. *Ib.*

3. Where A., having several tracts of land, devises one tract in fee to B., who is one of his heirs, and another tract in fee to C., another heir, each takes by devise, and not by descent. *Raiford* v. *Peden*, 466.

DIVORCE:

1. On the trial of issues directed by the court, upon a petition for a divorce, the mere confession of the husband, that he was guilty of the adultery charged, is not admissible evidence. *Hansley* v. *Hansley*, 506.
2. A divorce *vinculo matrimonii* will not be granted, unless it is alleged and shewn that the husband or wife lived in adultery, after the separation had taken place. *Ib.*

DOWER:

On a petition for dower, when it appeared that the deed under which the widow's husband claimed, had been delivered, but had not been registered at the time of his death and could not since be found; *Held*, that the husband did not die seized, and the widow had no right to recover her dower, at least in a court of law. *Thomas* v. *Thomas*, 123.

EJECTMENT:

1. Where a defendant in an execution is sued in ejectment by the purchaser under that execution, he is not prevented from contesting the right to recover, unless the execution was a valid one. *Smith* v. *Fore*, 37.
2. Generally speaking, in an action of ejectment, one, who comes in as landlord, is to be taken as admitting the possession of all the land, described in the declaration, to have been in the tenant and to be in himself. *Ib.*
3. But when a declaration embraced several tracts, held separately by different tenants, the admission of possession by the landlord should be referred only to the tract occupied by the tenant, on whom the process was served. *King* v. *Brittain*, 116.
4. The actual possession under color of title, for seven years, though of a very small portion of the land and that in the midst of the woods, will confer the title on the possessor to the whole tract covered by his grant, there being no actual possession of any other part by another person. *Lenoir* v. *South*, 237.
5. In an ejectment the jury may find the precise interest of the

lessor of the plaintiff and find the defendant guilty as to that, and judgment shall be entered accordingly. *Ib.*

6. When the real plaintiff in ejectment is a tenant in common, though he may declare for the whole, he has not an absolute right to have a verdict for the whole, but the jury may render such a verdict, leaving the plaintiff to take possession at his peril. The more correct course, however, is, when the extent of the title can be seen with reasonable certainty, to set forth in the verdict the undivided share, to which the title appeared, and to enter the judgment accordingly. *Pierce* v. *Wanet*, 446.
7. A plaintiff, who has recovered in an action of ejectment, has no right to seize upon the produce of the land, which has been severed before the writ of possession executed. His remedy is by an action for the *mesne* profits. *Brothers* v. *Hurdle*, 490.

ELECTIONS:

When a man is indicted, under the statute, for "knowingly *and fraudulently* voting at an election," when he is not qualified to vote, he cannot justify himself by shewing, that he was advised by a very respectable gentleman that he had a right to vote; for the maxim that "ignorance of the law excuses no man," applies as strongly to this case as to any other. *State* v. *Boyett*, 336.

ESCAPE:

1. In action for an escape, if the defendant wishes to except, upon the ground of its being a penal action, that it is brought in the wrong county, he must make the objection by plea in abatement. *Whicker* v. *Roberts*, 485.
2. Where a prisoner confined for debt escapes, the officer, in an action against him for the escape, can only excuse himself by shewing that he has not only made fresh pursuit, but also that he has actually recaptured the prisoner before suit brought. Without this fresh pursuit will not excuse the officer, even though the prisoner die before the officer has it in his power, by due diligence, to recapture him. *Ib.*
3. In this state the defense of fresh pursuit and recapture need not be by plea, but may be made on the general issue. *Ib.*

ESTOPPEL:

1. The doctrine of estoppel does not apply to the sovereign nor to the assignee of the sovereign. *Wallace* v. *Maxwell*, 110.
2. A. being entitled to a distributive share in certain slaves belonging to an intestate's estate, before administration granted, conveyed by deed to B. certain of the said slaves

specifically and by name. After letters of administration issued B., who was also one of the next of kin, joined with A. and the other next of kin in a petition against the administrator for a settlement of the estate and a division of the slaves, and the slaves, which had been conveyed by A. to B., were under the proceedings on that petition allotted to A. *Pass* v. *Lea*, 410.

3. *Held*, that, in action by B. against A. to recover the slaves, A. was estopped from denying that she had title to the slaves, at the time she conveyed them. *Ib.*
4. *Held*, that the proceedings under the petition did not estop B. from asserting his title against A. *Ib.*

EVIDENCE :

1. The record of the removal of a cause from one county to another is not relevant nor proper evidence, to be submitted to the jury on the trial of the case, and counsel have no right to draw any inference from it in their remarks to the jury. *Bumgarner* v. *Manney*, 121.
2. Under the act of 1848, ch. 53, on the trial of an ejectment, brought by a purchaser at an execution sale against the defendant in the execution or one bound by its teste, no judgment need be shewn; at all events unless the purchaser be the plaintiff in the execution. *Rutherford* v. *Raburn*, 144.
3. In cases, where it is necessary to produce the judgment, as where the opposite party claims under a prior conveyance, a variance between the judgment and the execution will not avoid the proceedings under the execution; provided enough appears to enable the court to see, with reasonable certainty, that in fact the execution was issued and intended to enforce the particular judgment. *Ib.*
4. In this case, the note, on which the judgment was obtained, was payable to the firm of "Lester, Kilgore & Bates," the judgment was in the name of "Philip Lester, Josiah Kilgore and William Bates," and the execution was in the names of "P. Lester, Kilgore & Bates," and for the same amount as the judgment; *Held*, that the variance in the names came within the mischief, intended to be remedied by the act of 1848, and did not vitiate the execution. *Ib.*
5. Although land alone is mentioned in the act of 1848, it seems to be the unavoidable interpretation of it, that the sales of personalty, under execution, must, in like manner, be upheld, as being within the mischief. *Ib.*
6. It is sufficient evidence of the probate of a will to pass real estate, that it is certified by the clerk that "it was proved in open court by H. G., a subscribing witness, and

recorded," when it appears on the face of the paper, that there were two subscribing witnesses. *Harven* v. *Springs*, 180.

7. Where the lessors of the plaintiff claimed as the heirs-at-law of one A. D., who was dead; *Held*, that the declarations of the said A. D. that the said lessors were the children of a married sister, deceased, and were her nearest living relations, were admissible in evidence, to prove the fact of such relationship. *Moffitt* v. *Witherspoon*, 185.
8. Such declarations are competent to prove marriages as well as births. *Ib.*
9. The declarations of counsel on the trial of a cause, as to matters of fact, are not evidence against one, who was managing the suit as agent of the client, even if they could be against the client himself. *Ib.*
10. *Held*, that it was error in a judge to instruct the jury, when the inquiry was as to the mental capacity of a party, that "it was not sufficient that she should be able, merely to answer familiar questions, but to manage her business with judgment and discernment." It is sufficient, if the person understood what he was about. *Ib.*
11. A party does not make one witness by taking his deposition, which he declines to read, or by having him subpœnaed, and then declining to examine him. *Neil* v. *Childs*, 195.
12. When a witness is impeached by showing that he has made contradictory statements, it is perfectly regular, in reply, to shew that he has made consistent statements. *Hoke* v. *Fleming*, 263.
13. In an action for a breach of contract for repairing a vessel, in not making the repairs according to the contract, after the plaintiff had given evidence of the condition of the vessel, after she was returned to him, it was competent for him to introduce witnesses of skill in such matters to give their opinion, upon the evidence first given as to the difference in the value of the vessel as thus repaired, and what her value would have been, if repaired according to the contract. *Sikes* v. *Paine*, 280.
14. And it is not necessary that such witnesses should be regular ship carpenters, if they have occasionally worked on vessels, owned and sailed in them for a long time and possess the requisite skill to enable them to judge. *Ib.*
15. Where a plaintiff charged a defendant, as his agent, with having received the hires of negroes subsequent to November, 1840, and the defendant offered to prove that another

person, as his agent, had received the hires prior to November, 1840; *Held*, that this evidence was irrelevant and properly rejected. *Beasley* v. *Downey*, 284.

16. A deposition of a witness was taken on the 28th of December, 1846, on a notice served on the 26th of that month, under the act requiring three days' notice to be given, the party opposing the deposition appearing at the time of taking it and objecting to the length of notice, and declining to cross-examine; *Held*, that the deposition should be rejected. *Ib.*
17. One day in such cases, is to be counted inclusive and the other exclusive. *Ib.*
18. In an action of assault and battery, when the defendant offered evidence to shew that he was not actuated by malice in making the assault, it is competent for the plaintiff, in reply, to prove that the defendant, since the commencement of this action, had proposed to fight him, though this proof could not have been offered in chief. *Mills* v. *Carpenter*, 298.
19. A party may give in evidence the declarations of a deceased person, made against his interest, upon the subject matter in controversy. *Peace* v. *Jenkins*, 355.
20. In an action upon a bill of exchange, the evidence of a witness, who cannot swear to the hand-writing of either party of the firm, in whose name the bill was drawn, but who testifies, that in his opinion, the hand-writing was the same as that of many notes, he had presented to the firm and which had been paid by them, was competent, and it was proper to leave such evidence to the jury, to be judged of by them. *Gordon* v. *Price*, 385.
21. By the law merchant, a protest of a bill by a public notary is in itself evidence. And by our statute, Rev. Stat., ch. 13, sec. 10, such protest is *prima facie* evidence. *Ib.*
22. Where a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness, consistent with his testimony on the trial. *State* v. *Dover*, 469.
23. Although an impeaching witness may be examined as to the general moral character of the witness impeached, and also as to his character for truth when on oath, and when not on oath, it is not necessary to put these questions in any particular order. *Ib.*

EXECUTION:

1. Where a *venditioni exponas* has issued and the land mentioned in it has been sold, another *venditioni exponas*

cannot issue, but, if it does, it is invalid and the purchaser under it acquires no title. The proper execution, if a balance of the judgment is unpaid, is a *fi fa.* *Smith* v. *Fore*, 37.

2. An officer, who has an execution, is bound to levy it on the property he finds in the defendant's possession, unless he knows, or has reason to believe, that it does not belong to him, or is by law exempted from execution. *Henson* v. *Edwards*, 48.
3. An officer, having an execution, levied on a gun belonging to the defendant and sold it; *Held*, that, not knowing or having good reason to believe that it was used by the defendant for mustering, and therefore exempt from execution, he was not liable to him for taking and seizing the gun. *Ib.*
4. It was the duty of the defendant in the execution to have informed the officer, before the sale, that the gun was kept for the purpose of mustering. *Ib.*
5. An execution does not bind trust estates from the *teste* but from the time it is "sued." *Williamson* v. *James*, 162.
6. Under an execution to sell the lands *descended* from A. to B., the sheriff has no authority to sell lands *devised* from A. to B., and such sale will be void. *Raiford* v. *Peden*, 466.

FORCIBLE TRESPASS:

1. The offence of forcible trespass must be charged as being done with a strong hand, "*manu forti*," which implies greater force than is expressed by the words "*vi et armis.*" *State* v. *Ray*, 39.
2. To constitute the offence, there must be a demonstration of force, as with weapons or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate or put in fear. *Ib.*
3. To make a forcible trespass indictable, some person must be in the house or on the premises, to cause the acts complained of to amount to a breach of the public peace or have an immediate tendency to provoke it—some person who has a right to defend the possession or be provoked at its invasion. *State* v. *Walker*, 234.
4. The indictment for forcible trespass must charge, who was present at the time of the alleged trespass, and if, on the trial, it appears that such person was not present, the defendant must be acquitted. *Ib.*

FRAUDS AND FRAUDULENT CONVEYANCES:

1. Where an agreement was made between a father and his sons, that they should purchase his land at execution sale,

at an under-value, for his use and for the purpose of keeping off other creditors; *Held*, that a purchase by the sons under such circumstances was fraudulent and void against creditors, whether the money was furnished by the father or paid out of their own means. *Morris* v. *Allen*, 203.

2. Under the act of 1840, ch. 28, the possession by a fraudulent donee cannot operate as notice of the conveyance to him of any land, but such tract or parcels of tracts, as may be occupied by him at the time of the second purchase; and especially it cannot so operate as to any parcels continuing in the possession of the donor. *Wade* v. *Hiatt*, 302.

3. Before the passage of the act of 1840, ch. 28, no voluntary conveyance of property, even to a child, could be upheld to defeat an existing creditor, if the creditor could find no other property of his debtor, out of which to obtain satisfaction. *Houston* v. *Bogle*, 496.

4. The act of 1840, ch. 28, applies only to voluntary conveyances made after that act went into force. Its application to prior voluntary conveyances would be unconstitutional, as it is not the province of the legislature but of the judiciary, to declare what the law was before the passage of any act. The legislature cannot divest vested rights. *Ib.*

GIFTS OF SLAVES:

A. in 1825 made a parol gift of a negro man to her grandson B. B.'s father took him into possession at that time and kept him till 1841, when he conveyed him and other negroes by deed of gift to his said son and delivered him to B. In 1840 the grandmother's husband (she having been married a second time) demanded the negro man of the father, who refused to deliver him. B. kept the negro from 1841 to 1846, treating him as his own. In 1843, B. requested permission of his grandmother to sell the negro, which was refused; *Held*, that B.'s possession, under those circumstances, for five years, even with a constant claim of title, could not divest the right of his grandmother's husband. *Graham* v. *Davidson*, 245.

GRANT:

1. From an actual, continuous possession of land up to known boundaries for thirty years, the law presumes a grant to the party in possession and a title in those claiming under him, and the jury should so find. *Wallace* v. *Maxwell*, 110.

2. The occupation must be such as is consistent with the usages of agriculture, such as cultivating the land, clear-

ing new, and turning out old fields, and cutting timber promiscuously. *Ib.*

3. Where A., B., C. and D. had had possession of a tract of land for upwards of forty years, under successive conveyances from A. to B., from B. to C. and from C. to D., with the exception of five years, between the twentieth and twenty-fifth year, during which period no possession was proved; it was held that, notwithstanding, a presumption arose of a grant from the state. *Reed* v. *Earnhart*, 516.
4. A continuous, unceasing possession is not necessary to raise such a presumption. *Ib.*
5. The presumption of a grant, from long possession, is not based upon the idea that one actually issued, but because public policy and "the quieting of titles make it necessary to act upon that presumption." The presumption can only be repelled by proof of the fact that the state never did part with its title. *Ib.*

HUSBAND AND WIFE:

1. Where a judgment was obtained before a justice of the peace against a husband and wife, on a bond executed by them during their coverture, and execution levied on the land of the wife, and returned to the county court, where, after the death of the husband, an order was made for the sale of the land; *Held*, that the wife was entitled to a *certiorari* to the superior court. *Lassiter* v. *Harper*, 392.
2. Upon the probate of a deed for land by husband and wife, the wife residing in another state, a commission to take the private examination of the wife may issue from the court of the county where the land lies, under the act of 1751. In the Revised Statutes, by a misprint, the word "*country*," in the act of 1751, is changed to the word "county," but from the context the construction of the Revised Statute must be the same as that of the act of 1751. *Pierce* v. *Wanett*, 446.
3. In order to be allowed to introduce in evidence the deed of a married woman, the following facts were proved: "that upon the record of New Hanover county court, at August term, 1818, there was an entry in these words: Ordered that John McCall and David Jones be appointed to take the private examination of Sarah Pierce, wife of Peter, touching her free execution of a deed executed by them to Samuel Potter, dated July 21st, 1818. On the 10th of August the clerk issued a commission to the said McCall and Jones, as residents of New Hanover, to take the privy examination of the *feme*, reciting that the deed had been proved in

the county court, and that it had been represented to the court, that the said Sarah could not travel, &c., and upon it the commissioners on the same day returned the private examination," and then follows an entry on the commission, that the execution of the deed was proved by McCall, who and Jones are the subscribing witnesses, upon which it was registered ; *Held*, that this was not sufficient proof of the execution of the deed by the wife. *Ib.*

4. A married woman cannot make a contract with her husband, except through the intervention of a third person, to whom the duty of enforcing it, in her behalf, belongs. It must be by deed, to which she must be a party. *Barbee* v. *Armstead*, 530.

See Divorce—Marrying an Infant Female.

INDICTMENT :

1. At the common law no trespass on chattels was an indictable offence without a breach of the peace ; that is, either the peace must be actually broken, or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. *State* v. *Phipps*, 17.
2. Although it is not proper, in an indictment, to lay an offence as committed against "the act of assembly," instead of saying against the "statute," yet the informality is one of those cured by our act of assembly. *State* v. *Tribatt*, 151.
3. It is not necessary nor convenient to introduce, in an indictment for a misdemeanor, to which the statute of limitations applies, averments, with the view of taking the case out of the statute, by bringing it within the proviso. *State* v. *Watts*, 369.
4. Where, on a capital trial, the prisoner challenges a juror for favor, and the solicitor for the state admits the cause assigned to be true, the prisoner is bound by his challenge and cannot afterwards be allowed to have the matter tried, either by triers or the court. *State* v. *Creasman*, 395.
5. On the trial of an indictment for murder, where it is alleged for error that the court improperly overruled a challenge of the prisoner to one of the jurors, the record must show for what cause the challenge was made ; otherwise the Supreme Court cannot say, whether there was error or not. *State* v. *Dover*, 469.
6. Where a juror, upon being challenged, swears that he has formed and expressed an opinion, but only upon rumor,

but that he could do impartial justice upon hearing the evidence in the case; *prima facie* the juror is competent; though in some cases the court or the triers may find otherwise. *Ib.*

INSOLVENT DEBTORS:

Where a man has been arrested under a *capias ad satisfaciendum*, and has given bond for his appearance at court; where an issue of fraud has been made up; where the issue has been continued from term to term; where his sureties have from time to time surrendered him; where the issue has been decided against him and he has been committed to prison—in all these cases, at the instance of the creditor; *Held*, that, under the act, Rev. St., ch. 58, sec. 6, the creditor is responsible to the jailor for his fees, or allowance for the food furnished to the prisoner, during the whole time he was confined in jail. *Veal* v. *Flake*, 417.

JUSTICE'S EXECUTIONS:

1. If the jury can collect from the testimony, that the description of land, levied on by a constable under a justice's execution, as fully identifies it, as if the words of the act of assembly had been literally followed, the levy must be pronounced to be good. *Jones* v. *Austin*, 20.
2. Where the return of a constable of a levy on land, under an execution from a justice out of court, does not state that there was a want of goods and chattels, and the court directs a *venditioni exponas*, the court must be presumed to have acted right, to have acted upon a waiver of the search for goods and chattels. *Ib.*

JUSTICE'S JURISDICTION:

1. A note for seventy dollars, payable in current *bank notes*, though it is not negotiable, yet comes within the jurisdiction of a single justice. *State* v. *Corpening*, 58.
2. A justice of the peace, before whom a warrant is tried, is not permitted to sign the name of a surety to the stay of execution, even though the person, whose name is signed, afterwards assents to it and pays the judgment. *Rickman* v. *Williams*, 126.
3. It seems that none but the surety himself or one for him in his presence can sign his name to the stay of a justice's execution. *Ib.*

LIMITATIONS, STATUTE OF:

1. To repel the statute of limitations, a promise to pay must be proven, either express or implied. *Smith* v. *Leeper*, 86.

2. The law will imply a promise, when there is an acknowledgment of a subsisting debt, unless there be something to rebut the implication. *Ib.*
3. If one pays a debt in part, the law implies a promise to pay the balance, in the absence of any circumstance to negative such a promise. *Ib.*
4. When a copy of an account was shewn to the defendant, and she said "she had no money, but would call in a few days and settle it," that "she did not intend to cut him out of it"; *Held*, that this was an explicit acknowledgment of a subsisting debt, from which a promise to pay might be implied, if indeed there was not evidence of an express promise. *Ib.*
5. Where only one, of several tenants in common of a negro, sues in tort, the statute of limitations cannot operate upon him, though it might against all, if his co-tenants, against whom it was available, joined in this action. *Quere*, how would it be, if the objection had been taken by a special plea? *Weare* v. *Burge*, 169.
6. An adverse possession of a slave for three years confers on the possessor a complete title to the slave. *Call* v. *Ellis*, 250.

MAD DOGS:

In an action under the act of assembly, Rev. Stat., c. 70, giving a penalty of fifty dollars against the owner of a dog, if he has good reason to believe he has been bitten by a mad dog, and neglects or refuses to kill him immediately, it is not necessary to prove that the biting dog was in fact mad; it is sufficient, if the owner of the dog had good reason to believe he was mad. *Wallace* v. *Douglass*, 79.

MALICIOUS PROSECUTION:

1. In an action for malicious prosecution, the oath of the prosecutor in the original complaint or before a magistrate is evidence for him. *Johnson* v. *Chambers*, 287.
2. A defendant, in an action for malicious prosecution, is only to be fixed with the want of probable cause, by what he knows when he commences the prosecution; although he is allowed to protect himself by any facts, which he is afterwards able to prove, which shew the plaintiff to be guilty, or tend to shew it. *Ib.*
3. The dismissal of a state's warrant by a magistrate raises the presumption of a want of probable cause, but not of malice. *Ib.*
4. The law raising no such presumption, the question of malice

must be left to the jury, as a question of fact, and cannot be decided by the court. *Ib.*

MARRYING AN INFANT FEMALE:

1. On an indictment for marrying a female infant under the age of fifteen years, where the defendant relies upon the statute of limitations as to prosecutions for misdemeanors Rev. Stat., ch. 35, sec. 8, proof that them arriage was by consent of the mother and was solemnized by a minister of the gospel in the presence of six or seven persons, and that the parties lived together afterwards, openly, as man and wife, shall protect the defendant from the operation of the proviso, that the offence was committed in secret. *State* v. *Watts*, 369.
2. So where the parties went to an adjacent county to be married and afterwards returned to the county of their domicil, where they lived together as man and wife, the fact being known to the community, and the defendant continuing in the open exercise of his duties as a minister of the gospel, it cannot be held that he absconded from the county, in which he was married, or concealed himself, so as to bring his case within the operation of the second part of the said proviso. *Ib.*

MILLS:

1. Possession alone will maintain an action on the case at common law for overflowing one's land, and therefore is sufficient to support a petition under our act of assembly, in relation to mills. *Pace* v. *Freeman*, 103.
2. The act of assembly of 1844, which excludes trial by jury in the county courts of Henderson and other counties named, refers to trials by a jury in court. A petition, therefore, to recover damages for injury to one's land from the erection of a mill dam, must still be brought in the county courts of those counties. *Ib.*

MORTGAGE:

A. conveyed to B. a tract of land by a deed absolute on its face, but intended merely as a security for money loaned, and B. gave a bond for the re-conveyance of the land, when the money was repaid; afterwards B. sold the land to C. for a full and valuable consideration, and then the creditors of A. sold the land by execution, and D. became the purchaser; *Held*, that D. only acquired the right of A., that is, the right to demand in equity a conveyance of the land from C., upon paying what remained due of the money loaned by B. to A. *Kerr* v. *Davidson*, 369.

NUISANCE:

1. A person cannot kill a dog in the owner's house or yard, upon the pretense that he is a nuisance, because he had, at a former period, chased or bitten some one else. *Perry* v. *Phipps*, 259.
2. Where a man has been attacked by a dog on the owner's premises, but the dog is driven off by the family so that the man is no longer in danger of being bitten, he is not justified in killing the dog, while the latter is running from him. *Ib.*

OFFICIAL BONDS:

Where a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is attached to the office by statute, such bond; given subsequently to the latter statute, embraces the new duty and is a security for its performance; unless where, when the new duty is attached, a bond is required to be given specifically for its performance. *State* v. *Bradshaw*, 229.

PARTITION OF SLAVES:

On a petition for the partition of slaves, when the defendant denies the petitioner's rights and insists that he (the defendant) is entitled to the slaves in severalty, it is not necessary for the petitioner, as in the case of a petition for the partition of land, to establish his right at law, before the relief he seeks can be granted. The court in which the petition is filed must decide the question of right. *Edwards* v. *Bennett*, 361.

PARTNERSHIP:

1. Where a partnership was about to be formed, and one, who was to be a member, purchased a chattel, which was afterwards used by the firm, and agreed by them to be taken from him, upon his retiring from the business, and the note he gave for the chattel was, in consequence of this agreement, surrendered to him; *Held*, that the other partners were bound to pay the original vendor. *Shaver* v. *Adams*, 13.
2. In an action by a surviving partner for a debt, alleged to be due to the firm, the defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was, that the debt, being for the board of this partner, should be paid out of the store, in which the plaintiff and the defendant were co-partners. *Norment* v. *Johnston*, 89.

PAYMENTS:

1. When the law is called upon to make the application of payments by a debtor to a crediter, who has various demands against him, and no application has been made by the parties, the application can only embrace debts or demands for certain sums, or such as can be made certain, as accounts for work and labor, or for goods sold or the like, but not uncertain and unliquidated damages. *Ramsour* v. *Thomas*, 165.
2. There is another rule in this application by the law, that it is to be first made to the debt, for which the security is the most precarious. *Ib.*
3. The commissioners of Newbern recovered a judgment against the sheriff and his sureties for the amount of the taxes due to the town, which he had failed to pay over. Afterwards one of the sureties had the money paid and an assignment made to a third person of the judgment, by the attorney of the commissioners, which was afterwards ratified by the commissioners, and a receipt was given by the treasurer of the board to the sheriff to enable him to renew his bonds. *Commr's of Newbern* v. *Dawson*, 436.
4. *Held*, first, that the payment of the money and the assignment to a third person of the judgment, did not amount in law to a payment and satisfaction of the judgment, as against the defendants therein. *Ib.*
5. *Held*, secondly, that, although the receipt may have operated as a fraud upon the court, yet it is not conclusive as to the fact of payment by the defendants in the judgment, but may be explained. *Ib.*

PLEADING AND PRACTICE:

1. Where a defendant wishes to avail himself of a certificate of discharge in bankruptcy, obtained after his pleas had been entered, he must plead it as a plea since the last continuance. *Corpening* v. *Grinnell*, 15.
2. When the judge charges, in an action for work and labor done, that work done on the land of the hirer, "was necessarily beneficial," he erred, if he stated that as a principle of law, and if he stated it, as a matter of fact, he erred, because he had no right to state his opinion upon the matter of fact. *Dover* v. *Plemmons*, 23.
3. The statement of the case by the presiding judge is, in our practice, a substitute for a bill of exceptions, which sets forth the errors complained of. If no such statement accompanies the appeal, and no error appears on the record, the judgment will be affirmed. *State* v. *Ray*, 29.

4. The person, to whom the money is due, on a claim put into the hands of a constable for collection, should be the relator in an action, brought on the official bond for a breach of his duty in relation to such claim, and not the agent of such party, though the claim had been first put into his hands, he being a constable, and having transferred it for collection to the person sued. *State* v. *Farmer*, 45.

5. A judgment *nunc pro tunc*, is a judgment of the term of the court, at which the court, making the amendment, says it ought to have been rendered. *Bradhurst* v. *Pearson*, 55.

6. It is the duty of every court to make its own record, and no other court can indirectly examine into the manner in which it is made. *State* v. *Corpening*, 58.

7. The party, with whom a constable makes the contract for the collection of a note, is the proper relator in an action on his official bond, and not the person to whom the note is payable. *Ib.*

8. Where there is an appeal by either party from an interlocutory order in relation to a rule founded on an affidavit, the court below should send up the facts, as they find them, and not merely the affidavit, which is only evidence. *Wallace* v. *Reid*, 61.

9. Action for a joint battery and false imprisonment against four persons was tried. By agreement of counsel, the verdict, if agreed upon, was to be rendered during the adjournment of the court. The jury returned a verdict finding all the defendants guilty and assessing separate damages against each, and the clerk entered the verdict accordingly. When the court met after the adjournment, the jury, being informed that they had done wrong, in assessing separate damages, were permitted to amend their verdict by finding damages against all the defendants jointly ; *Held*, that the judge below acted properly in permitting the amendment of the verdict. *Curtis* v. *Smart*, 97.

10. Upon the trial of an indictment for an affray, after the jury had returned into court and intimated an intention to acquit one of the defendants, but had not announced their verdict, the court told them, that, if they believed the evidence, both of the defendants were guilty ; whereupon the solicitor for the state directed the clerk to enter a verdict of guilty as to both, which was done, and the jury, being asked, if that was their verdict, made no direct assent but by a nod from each of them ; *Held*, that this proceeding was so irregular and contrary to the established

mode, that the judgment should be set aside. *State* v. *Shule*, 153.

11. In actions of contract, the parties must all join in the action, or advantage may be taken of the non-joinder on the general issue; but, in actions of tort, the non-joinder must be pleaded in abatement. *Weare* v. *Burge*, 159.
12. An action upon the administration bond of an administrator, for a distributive share belonging to a married woman, must be brought on the relation of the husband and wife, though the husband may have assigned his wife's share to a third person. *State* v. *Clark*, 172.
13. Where a certain duty arises under a sealed instrument, merely accord and satisfaction by parol is no sufficient answer, for a deed ought to be avoided by a matter of as high a nature. *Cabe* v. *Jameson*, 193.
14. But where the covenant sounds altogether in damages, though secured by a penalty, accord and satisfaction executed, though in parol, is a good defense. *Ib.*
15. If the promise declared on be an absolute one, and that proved be conditional, the variance is fatal, as where the plaintiffs declared, that in consideration the plaintiffs would pay the defendant one hundred dollars for the lease of a gold mine, he would warrant that they should make that sum in ten days; and the promise proved was, *if they would do the work*, he would warrant, &c.; *Held*, that the variance was substantive and fatal. *Starnes* v. *Erwin*, 226.
16. In an action on a verbal agreement, alleged to contain a warranty, it is competent for the jury to decide, whether the word "warrant" was used by the vendor merely as a word of high commendation of the subject of the trade, or whether it was intended to import that the vendor would be liable in damages, if the thing sold should not answer the description. *Ib.*
17. Where a verdict is rendered in the court below in favor of the plaintiff, he cannot, in the Supreme Court suffer a nonsuit. *State* v. *Mizell*, 279.
18. After pleading in chief, it is too late for the defendant to take exception to the writ. *Mills* v. *Carpenter*, 298.
19. Where personal property is left to one for life, remainder to others, and, after the death of the tenant for life, it comes to the possession of the administrator of such tenant, those entitled to remainder cannot sue the administrator by petition in a court of law, under the statute, Rev. Stat., c. 64, sec. 5, but must proceed in equity; because no such fiduciary relation as that contemplated by the statute exists between the parties. *Pool* v. *Davis*, 310.

20. The plaintiffs placed in the hands of one A. a judgment to collect against B. Afterwards A. paid the amount of the judgment to the plaintiffs, but at the same time said he had received no part of the judgment from B., and the plaintiffs told him he might take the judgment and use it as his own; *Held*, that if this was a payment by A. without the authority of B., it was an officious payment by A. and could not protect B. against a suit against him on the judgment. *Null* v. *Moore*, 324.

21. *Held*, secondly, that although the statement of A., which was introduced as evidence, was in writing, yet it was proper to leave it to the jury, whether A. paid the judgment as agent for B., or whether the transaction was not a purchase by A. from the plaintiffs. *Ib.*

22. A special verdict is defective which finds only the evidence, from which facts may be inferred. It must find the facts themselves. *State* v. *Watts*, 363.

23. A judgment may be vacated at any time, on motion in the same court in which it was rendered, upon parol proof that it was entered irregularly and not according to the course of the court; as, for instance, where the defendant in the cause was an infant, and no guardian had been appointed to represent his interest. *Keaton* v. *Banks*, 381.

REPLEVIN:

1. In action of replevin, under our statute, Rev. Stat., ch. 191, if the plaintiff be nonsuited, the defendant cannot have a judgment for damages assessed by a jury, but only a judgment for the thing replevied and costs. *Pannell* v. *Hampton*, 463.

2. At common law in such a case the judgment was for the return merely. *Ib.*

SHERIFFS:

1. It is no answer for a sheriff to say, when sued for negligence in not executing process against a debtor, that the debtor, even after being imprisoned under a *ca sa.* might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the judgment creditor. *Sherrill* v. *Shuford*, 200.

2. The true inquiry is, has the sheriff, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property, which might, by due process, have been subject to it, the sheriff shall be liable to the amount of the debt, which might have been thus secured. *Ib.*

3. The reputation of the insolvency of a defendant in an execution will not excuse the officer who has it, from liability for neglect of duty in not endeavoring to ascertain for himself, whether there is property or not, subject to the execution. *State* v. *Edwards*, 242.

SLANDER:

1. In an action of slander, the jury may, if they please, give exemplary damages. *Gilreath* v. *Allen*, 67.
2. In an action of slander against the defendant, for charging the plaintiff with perjury, in swearing on a certain trial, that "he knew the character of B., and would from his general character, believe him on oath," it is competent for the plaintiff, in answer to a plea of justification, to prove by witnesses that they also would believe B. on oath from his general character. *Howell* v. *Howell*, 82.
3. In an action of slander, where it appears, that the defendant was drunk, when he uttered the words, this may go in mitigation of damages, as tending to rebut malice. But where it appears he repeated the charge, both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged, is no reason for abating the damages. *Howell* v. *Howell*, 84.
4. A. charged B. with perjury, in swearing before a single justice to the following affidavit, viz.: "A. has a certain cow in his possession, that belongs to him, the said B.; and the description is red sides with some spots and unmarked"; *Held*, that the words were not actionable in themselves, as the declaration did not aver, nor the proof shew, that the oath was taken in a proceeding, in which an oath could be judicially administered. *Sluder* v. *Wilson*, 72.
5. Where A. had been constable in 1843, and again held the appointment in 1846, and, during the latter period, one says of him, that, while constable in 1843, he had made a false return, A. cannot maintain an action of slander for these words, unless he alleges and proves some special damages. *Edwards* v. *Howell*, 211.
6. Words slandering a man as to his conduct in his office, profession, &c., from which the law implies damages necessarily, must relate to the office, &c., in which the person slandered is engaged at the time of the speaking of the words. *Ib.*

SLAVES, &c.:

1. Under our statute, prohibiting the sale of liquor to a slave,

which gives a penalty of one hundred dollars against the offender, and declares that it shall "be recovered by warrant, before any justice of the peace, and applied, one-half to the use of the party suing for the same, and the other half to the use of the poor of the county," any person may sue for the penalty, as informer *qui tam*. *McRae* v. *Keller*, 398.

2. Permitting a man's slaves to meet and dance on his premises on Christmas Eve or other holidays, even though other slaves, with the permission of their masters, participate in the enjoyment, and though some of the younger members of their owner's family occasionally join in the dance, does not constitute the offence of keeping a disorderly house nor any other offence. *State* v. *Boyce*, 536.

TRUSTEE:

Where one conveyed to a trustee, for the purpose of paying his debts, all his interest in the goods in a certain store, his books, notes, accounts, &c., and the trustee sold the whole at public sale for a price upon which he fixed; *Held*, that the person, who made the conveyance, being present at the sale and not objecting, was bound by it, at least at law, however irregular the sale may have been. *Lamb* v. *Goodwin*, 320.

USURY:

1. Where A. contracted for a piece of land, at the price of $1,000, and being unable to comply with the terms, directed the vendors to convey the legal title to B., which was done, and he afterwards leased the land to A. for about $100 per annum, agreeing that when A. should repay him the purchase-money, he would convey the land to A.; *Held*, that, here there was no usury, at least none that could be reached at law. *Davis* v. *Cunningham*, 156.
2. Where, upon an usurious contract, the lender receives from his debtor, in payment of the principal and the usurious interest, the note of a third person, he makes himself liable to the penalty for usury, in the same manner as if he had received payment in money. *Cavaness* v. *Troy*, 315.
3. Where a deed of trust is given for the security of several debts, some of which are *bona fide* and some tainted with usury, the deed is not void as to the *bona fide* debts, provided these debts are separate from, and unconnected with, the usurious debts. *Brannock* v. *Brannock*, 428.

WILL:

1. Where a testator, being sick in bed, called for his will, and

directed his son to burn it, and, instead of doing so, he retained the will and burnt another paper for the purpose of deceiving his father, and the father was thus deceived into the belief that his will was burnt; *Held*, that this did not amount to a revocation, the will not having been actually burnt. *Hise* v. *Fincher*, 139.

2. A will is well attested by subscribing witnesses, when, though not in the same room with the testator, they are in such a situation, that the testator either sees or has it in his power to see, that they are subscribing, as witnesses, the same paper he had signed as his will. *Graham* v. *Graham*, 219.
3. Where the supposed testator could only see the backs of the witnesses, but not the paper they were subscribing; *Held*, that the paper writing was not well attested as a will. *Ib.*
4. Whether a re-publication of a will can be proved by parol evidence of the declarations of a testator, merely, is matter of great doubt. *Battle* v. *Speight*, 459.
5. At all events the evidence should shew a clear determination on the part of the testator to republish. *Ib.*

WITNESSES:

When a witness has been summoned to attend at court, though a verdict may be rendered in the cause, yet if a new trial is granted, he is bound to attend the subsequent terms, until a final decision, without a new subpœna. *Fulbright* v. *McElroy*, 41.

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